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REPORTS  
OF  
CASES ARGUED AND DETERMINED  
IN THE  
SUPERIOR COURT  
OF THE  
CITY OF NEW YORK.

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BY  
SAMUEL JONES AND JAMES C. SPENCER,  
REPORTERS OF THE COURT.

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NEW YORK SUPERIOR COURT REPORTS,  
VOL. XXXIX.

JONES AND SPENCER'S REPORTS,  
VOL. VII.

NEW-YORK:  
DIOSY & COMPANY, PUBLISHERS.  
1875.

Entered, according to Act of Congress, in the year 1875,  
By GEORGE S. DIOSY,  
In the office of the Librarian of Congress, at Washington.

*Rec. Oct. 15, 1875*

JUDGES  
OF THE  
SUPERIOR COURT  
OF THE  
CITY OF NEW YORK,  
DURING THE TIME OF THIS VOLUME OF REPORTS.

---

CLAUDIUS L. MONELL,  
*Chief Justice.*  
JOHN J. FREEDMAN,  
WILLIAM E. CURTIS,  
JOHN SEDGWICK.  
HOOPER C. VAN VORST,  
GILBERT M. SPEIR.  
*Judges.*



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CASES ARGUED AND DETERMINED  
IN THE  
SUPERIOR COURT  
OF THE  
CITY OF NEW YORK  
AT GENERAL TERM.

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JOHN SCHREYER, PLAINTIFF AND APPELLANT, v.  
THE MAYOR, ALDERMEN AND COMMON-  
ALTY OF THE CITY OF NEW YORK, DEFEND-  
ANTS AND RESPONDENTS.

I. PLEADING,—ADMISSION BY,—EFFECT OF.

1. When the defendant's pleading *formally and explicitly* admits that which establishes the plaintiff's right, he will *not be suffered to deny* its existence or to prove any state of facts inconsistent with that admission.
  - a. Thus, when the complaint avers that the *contract sued on was made* by the defendant, and the answer *expressly admits* such averment, the defendant can not be permitted to prove,—
    1. Either that the *contract was not his*, and that consequently he was not liable thereon.
    2. Or (there being no affirmative defense to that effect) *that the contract, being fair on its face, was illegal.*

2. ILLEGALITY OF CONTRACT,—DEFENSE OF MUST BE PLEADED, WHEN.

1. When the complaint avers the making of a contract fair on its face, and the answer *admits such averment*, the illegality of the contract can not be insisted on to defeat a recovery, *unless* such illegality is set up in *the answer as an affirmative defense.*

Before FREEDMAN, CURTIS and SPEIR, JJ.

*Decided February 1, 1875.*

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Statement of the Case.

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This action is brought to recover the eighth and last instalment upon a contract entered into by the defendants through the school trustees of the Tenth-ward of the city of New York, with the consent of the Board of Public Instruction of said city, with Alonzo Dutch, for the erection of a school-house. By the terms of the contract, it was to inure to the benefit of the Mayor, Aldermen and Commonalty of the city of New York. The contractor Dutch having failed, and having received the seventh instalment, leaving the eighth only unearned and unpaid, the plaintiff, with the consent of all parties, took an assignment of the contract from Dutch. This was recognized and assented to, and the plaintiff went on, furnished the materials and did the work necessary to earn the eighth and last payment. Thereupon the trustees and the Board of Public Instruction made the necessary certificates and requisitions upon the comptroller of the city of New York to require the payment of said three thousand dollars to the plaintiff, and so as to vest the money in the plaintiff;—in other words, the Board of Public Instruction and the school trustees of the Tenth-ward and the plaintiff had performed all the conditions precedent to entitle the plaintiff to receive his money and to require the defendant to pay the same; and the comptroller had and has the money in hand to the credit of the Board of Public Instruction and the school trustees of the Tenth-ward.

Upon the trial plaintiff's complaint was dismissed, and defendants entered judgment.

The plaintiff appealed from the judgment.

*D. M. Porter*, counsel for appellant.

*E. Delafeld Smith* and *D. J. Dean*, counsel for respondents.

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Opinion of the Court, by FREEDMAN, J.

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BY THE COURT.—FREEDMAN, J.—The motion for a nonsuit was granted on the ground that the contract sued upon was not the contract of the defendants, and that they were not liable on it, and if the defendants were in a position to raise the objection, the complaint was properly dismissed. In *Ham v. The Mayor, &c* (37 *Superior Ct. R.* 458), this court distinctly held that the defendants are not liable for the acts or contracts of the Board of Education or the Department of Public Instruction, and this decision, if applicable to the case at bar, would be conclusive upon that point. But under the pleadings in this case the defendants could not raise the objection. The complaint charged the defendants with having made the contract for the work, and with having agreed to pay the contract price. The answer expressly admits these allegations, and refers to the school trustees of the Tenth-ward, as defendants' agents. The defendants have therefore concluded themselves by such admission. A party, who formally and explicitly admits, by his pleading, that which establishes the plaintiff's right, will not be suffered to deny its existence, or to prove any state of facts inconsistent with that admission (*Paige v. Willet*, 38 *N. Y.* 28).

The admission referred to also precludes the defendants from insisting in the absence of a formal plea to that effect, that the contract as made is an illegal one. Since the Code, any new matter constituting a defense or partial defense must be pleaded (*McKyring v. Bull*, 16 *N. Y.* 297), and hence the objection that a contract which is fair upon its face, is illegal or contrary to public policy, must be taken by answer (*Cummings v. Barkalow*, 4 *Keyes*, 514).

The judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event.

CURTIS and SPEIR, JJ., concurred.

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Statement of the Case.

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MORGAN L. WEBB, PLAINTIFF AND APPELLANT,  
v. CORNELIUS VANDERBILT, *et al.*, DIRECTORS OF THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, IMPEADED WITH THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, AND OTHERS, DEFENDANTS AND RESPONDENTS.

FRANCIS H. STODDARD, PLAINTIFF AND APPELLANT, v. SAME.

EVERETT B. SANDERS, PLAINTIFF AND APPELLANT, v. SAME.

JAMES LAURIE, PLAINTIFF, AND APPELLANT, v. SAME.

THE TRUSTEES OF SMITH COLLEGE, PLAINTIFF AND APPELLANT, v. SAME.

I. DEMURRER.—ONE DEFENDANT ANSWERING WHILE OTHERS DEMUR.

1. EFFECT OF ON DEMURRANTS.

1. The fact that one of the defendants has answered, *has no effect* upon the determination of the question as to whether the demurrer is well taken or not.

II. STOCKHOLDERS HOLDING COMMON STOCK,—WHEN ACTION WILL NOT LIE AGAINST.

1. *An action at law to recover an ascertained debt due by the corporation, will not.*
2. *An action in equity to compel them as stockholders of common stock of a consolidated corporation to make, or to do any act towards causing to be made dividends on the stock of one of the consolidating companies, of earnings made by such consolidating company prior to the consolidation, the payment of which dividends is claimed to have been assumed by the consolidated company, or to compel them to declare or do any act towards causing to be declared, dividend on the stock of such consoli-*

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Appellant's points.

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dating company of the earnings of the consolidated one will not.

- a. Compare the opinion in this case with the one in *Chase v. Vanderbilt* (37 *N. Y. Superior Ct. R.* 334).

Before FREEDMAN, CURTIS and SPEIR, JJ.

*Decided February 1, 1875.*

These are appeals from orders sustaining demurrers to the complaints, with leave to the plaintiff to amend. The substance of the complaints and demurrers is the same as that of the complaint and demurrers in *Chase v. Vanderbilt* (33 *N. Y. Sup'r Ct. R.* 334).

*Birdseye, Cloyd, & Baylis*, attorneys, and *Lucien Birdseye*, of counsel for appellant, urged;—I. It is not proposed to re-argue here any of the questions passed upon by the general term of this court in *Chase v. Vanderbilt* (37 *N. Y. Sup'r Ct. R.* 334); but, assuming all that was held by the court in that opinion, and adding other material facts (which although before the court in that case, were not referred to or considered by it), to ask for the judgment of the court upon the points raised by such additional and material facts. Those additional facts are that, while *Vanderbilt* and other individual defendants demurred to the complaint, the corporation—the *Lake Shore & Michigan Southern Railway Company*—had appeared and answered in the action, taking issue upon the allegations of the complaint, and that the demurrants are holders of the common stock of the *Lake Shore & Michigan Southern Railway Company*.

II. After an answer has been interposed to the complaint, the demand for relief becomes immaterial (*Code* § 275; *Marquat v. Marquat*, 12 *N. Y.* 336; *Emery v. Pease*, 20 *N. Y.* 62). The only limitations put upon the rule that, after answer, the demand of relief in the

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 Appellant's points.
 

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complaint is immaterial, are : (1) That the relief must be limited to such as is proper in reference to the parties before the court. (2) It must be consistent with the case made by the complaint and embraced within the issue. (3) An action must be the proper remedy (*Smith v. Howard*, 20 *How. Pr. R.* 151; *Cowenhoven v. City of Brooklyn*, 38 *Barb.* 9; *Bradley v. Aldrich*, 40 *N. Y.* 510; *Hart v. Harvey*, 21 *How. Pr. R.* 382; *Barlow v. Scott*, 24 *N. Y.* 40; *Armitage v. Pulver*, 37 *N. Y.* 494; *Greason v. Keteltas*, 17 *N. Y.* 491; *N. Y. Ice Co. v. North Western Ins. Co. of Oswego*, 23 *N. Y.* 357; *Bidwell v. Astor Mutual Ins. Co.*, 16 *N. Y.* 263; *Heywood v. City of Buffalo*, 14 *N. Y.* 534; *Rome Exchange Bank v. Eames*, 1 *Keyes*, 588; *Mann v. Fairchild*, 2 *Keyes*, 106; *Beach v. Cook*, 28 *N. Y.* 508; *Wright v. Hooker*, 10 *N. Y.* 51; *Scott v. Pilkington*, 15 *Abb.* 280; *Gordon v. Hostetter*, 4 *Abb. N. S.* 263; *Colten v. Jones*, 7 *Rob.* 164; *Byxbie v. Wood*, 24 *N. Y.* 607).

III. It appearing that a good cause of action, of a legal character, is stated in the complaint against the Lake Shore & Michigan Southern Railway Company, as a corporation, upon its assumption of a guarantee of the preferred dividends, and that that corporation interposed an answer to that complaint; so that, under section 275 of the Code, and the cases decided under it, the demand for equitable relief has, as to that corporation, become immaterial, the action may proceed to trial upon the legal cause of action, and before a jury, if the corporation shall so insist; and the question now remains whether, to such an action against a corporation by a preferred stockholder, it is wholly incompetent and inadmissible to bring in holders of the common or unpreferred stock as defendants, to determine whether or not the holders of preferred stock are entitled to priority in payment of dividends over the common or unpreferred stock. It is submitted that, to

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Appellant's points.

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such action, the common stockholders, or some of them, are proper parties (*Code*, §§ 118, 119). (4) Section 118 of the *Code* merely re-enacts the former practice. It divides parties into two classes: (a) Those who are proper parties, whom, therefore, the plaintiff may sometimes join, or omit to join, as parties, in his discretion. (b) Those who are necessary parties, without whom the suit is absolutely defective. (5) The former rule on this point was to the same effect (*Bailey v. Inglee*, 2 *Paige*, 278; *Butts v. Genung*, 5 *Paige*, 254, 256; *Wendell v. Van Rensselaer*, 1 *Johns. Ch.* 344, 349; *Wiser v. Blatchley*, 1 *Id.* 437; *Murray v. Hay*, 1 *Barb. Ch.* 59; *Weale v. West Middlesex Water Works Co.*, 1 *Jac. & Walk*, 369; *The Attorney-General v. Jackson*, 11 *Vesey* (Sumner), 365 and notes. *Adair v. The New River Co.*, 11 *Id.* (Sumner), 429, 443; *Cockburn v. Thompson*, 16 *Id.* (Sumner), 321, 325-8, and notes page 350). See 1 *Moak's Van Santvoord's Pleadings*, 105, where he speaks of "necessary, as well as proper parties defendant" (*Id.* 107), &c., as to cases "where persons who are not absolutely necessary parties may be made defendants, at the election of the complainants" (*Id.* 746, 859). (6) The facts stated as to the number, absence, &c., of the common stockholders, sufficiently excuse the joining of any other holders of common stock than those named in the complaint (*Code*, § 119. 1 *Moak's Van Santvoord's Pleadings*, 77, 79, 116-17, &c.). (7) In *Thompson v. The Erie Railway Co.* (45 *N. Y.* 468, 478), the court of appeals very recently overruled the position that in a suit (precisely like the present) by a stockholder to recover preferred or guaranteed dividends, the common stockholders were absolutely essential parties. But the ruling of the court treats them as proper parties, so that their joinder would not be ground for a demurrer. (8) In numerous actions in England and Ireland, brought to enforce the rights of preferred stockholders to their dividends, it has never

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Appellant's points.

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been held that holders of common stock were improper parties, but almost uniformly the reverse. In most of these cases the directors, as such, have been made defendants. The cases may be classified as follows: (a) Cases in which holders of common stock, other than directors, were made parties; Crawford v. North Eastern Railway Co., 3 *Kay & J.* 723; Corry v. Londonderry & Enniskillen Railway Co., 29 *Beav.* 263; Coates v. Nottingham Water Works, 30 *Id.* 86; Smith v. Cork & Bandon, Railway Co., *Irish Rep.*, 3 Eq. 356; Maugham v. Leamington Gas Co., 15 *Weekly Rep.* 333. (b) Cases in which directors were joined with averment (like that in the present complaint) that they held common stock; Matthews v. Great Northern R. R. Co., 5 *Jurist*, N. S. 284. (c) Two cases in which it does not appear from the reports, whether or not common stockholders were joined; Sturge v. Eastern Union R. Co., 7 *De G. M. & G.* 858; Henry v. Great Northern R. Co., 1 *Id.* 606. (9) In Cramer v. Bird (*L. Rep.* 6 Eq. 143), common stockholders were held, for the purposes of that action, to be sufficiently represented by the directors; but the fund involved was small, and it was obvious that the whole of it would be absorbed between two classes of preferred stockholders; but the court held expressly that the inferior class of preferred stockholders were not sufficiently represented by the directors, and refused to allow the action to proceed till some of that class had been made parties. (10) In several English cases, it has been decided that holders of common stock were not sufficiently represented by the directors; and that all stockholders, whose interests might be affected by the decision, must be represented before the court, otherwise than through the medium of the corporation itself or of directors whose interests did not appear (Richardson v. Larpent, 2 *Younge & Coll.* 507; Lovell v. Andrew, 15 *Simons.* 581; Bailey v. Birkinhead R.



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Opinion of the Court, by FREEDMAN, J.

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Co., 12 *Beav.* 433; *Carlisle v. S. E. R. Co.* 1 *McN. & G.* 689; *Fawcett v. Laurie*, 1 *Drewry & Smale*, 192). (11) Both SEDGWICK, J., and SPEIR, J., in their opinions, have entirely overlooked the portions of the complaint here referred to, and these grounds for the joinder of the defendants demurring as holders of the common stock. The learned judge disposed of the case upon the authority of *Haywood v. The City of Buffalo* (14 *N. Y.* 537), above mentioned. And no reference was made by him to the distinction existing between that case and the present one, above adverted to. Here the corporation sued is liable for the debt, has interposed its answer, and the prayer for judgment has become immaterial under the cases above cited. In the case of *Heywood*, both defendants demurred to the complaint, which was one asking for equitable relief, in a case where no relief, either in law or in equity, could be granted, because the case was an attempt to enjoin perpetually the collection, by a municipal corporation, of an assessment due to it for the improvement of streets, the plaintiff not showing any ground whatever either for legal or equitable relief, and not averring but that the alleged invalidity of the assessment appeared on the face of the record.

*Matthews & Foley*, attorneys, and *James Matthews*, of counsel for respondents, in addition to the authorities cited in *Chase v. Vanderbilt*, cited *Stevenson v. Buxton*, 15 *Abb. Pr.* 352; *Kilbourn v. Allyn*, 7 *Lansing*, 352; *Brahe v. Pythagoras Association, &c.*, 11 *How. Pr.* 45; *Brewster v. Michigan Central R. R.* 5 *How. Pr.* 183; *Prouty v. Lake Shore & M. S. R. Co.* 52 *N. Y.* 363; *Story Eq.* § 1520.

BY THE COURT.—FREEDMAN, J.—The appeals before us present precisely the same questions that were determined by this court in *Chase v. Vanderbilt* (37 *N. Y.*

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Opinion of the Court, by FREEDMAN, J.

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*Superior Ct. R.* 334). It was held in that case that the complaint stated no cause of action whatever against the defendants, the parties demurring; and the ground of that decision was, not that the court did not possess jurisdiction of the subject-matter, or of the questions involved, but that the defendants could do nothing, nor could they be compelled by judicial sentence to do anything, which would give to the plaintiff the dividends he claimed, and that, therefore, the defendants were neither necessary nor proper parties to the suit. Until that decision is reversed by some higher court, it is conclusive upon us upon the questions covered by it.

The appellants insist, however, that the attention of the court was not called to, and the court on that occasion did not consider the fact, that while Vanderbilt and the other directors demurred to the complaint, the corporation, the Lake Shore & Michigan Southern Railway Company, had appeared and answered, and had taken issue upon the allegations of the complaint. There is nothing in the suggestion. Where there are several defendants, some may answer, while others demur. A demurrer is, in effect, a declaration that the party demurring will go no further, because the other has shown nothing against him. And a demurrer will be sustained where the cause of action set forth in the complaint fails to show any connection between the facts therein alleged, and the party defendant by whom the demurrer is interposed. But even those who answer, do not thereby waive the objection that the complaint does not state facts sufficient to constitute a cause of action (*Code* § 148).

It is also insisted that the court overlooked the fact that the defendants demurring were not only directors, but also holders of common stock. This suggestion is equally unavailable. If as directors they could neither do anything, nor be compelled to do anything, which would give to the plaintiffs the dividends, the pay-

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Statement of the Case.

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ment of which they claim was assumed by the Lake Shore & Michigan Southern Railway Company, it is difficult to perceive what they can do, or be compelled to do, in their capacity of holders of part of the stock. If the company is liable upon the obligation assumed or incurred by it, as alleged, it must respond in its corporate capacity, and if the defendants, as directors, are neither necessary nor proper parties to the action set out against the corporation, they are still less so as holders of part of the stock.

The order sustaining the demurrer in each of the five above entitled actions should be affirmed, with costs.

CURTIS and SPEIR, JJ., concurred.

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SAMUEL RAYNOR AND OTHERS, PLAINTIFFS AND  
RESPONDENTS, v. PETER W. HOAGLAND, DE-  
FENDANT AND APPELLANT.

I. PROMISSORY NOTES, PAYABLE TO ORDER.

1. TRANSFER OF, BY DELIVERY WITHOUT THE PAYEE'S INDORSEMENT.

1. The delivery on a valuable consideration amounts to an *assignment*, and passes the title to the note to the person to whom it is delivered.

*a. When such transfer will pass the title free from the equities between the maker and payee.*

1. It will, when the note thus transferred pursuant to agreement between the maker, payee and transferee to that effect, is delivered to the transferee in renewal of a former note made by the same maker, payable to the same payee, and indorsed by the payee, held by such transferee, and on which the liability of the maker and

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Statement of the Case.

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indorser had become fixed, and to which neither of them had any defense as against the holder.

## II. TRIAL.

### 1. MOTION TO DISMISS COMPLAINT, EFFECT OF MAKING ON A PARTICULAR GROUND.

a. If that ground is *untenable*, and there is no other ground which is *incapable* of being obviated, a *denial* of the motion is *proper*.

### 1. DIRECTION OF VERDICT FOR PLAINTIFF.

Upon the denial of such a motion, if no other motion or request is made, and no evidence given on the part of the defense, the court *can not do otherwise* than direct a verdict for the plaintiff.

Before FREEDMAN, CURTIS and SPEIR, JJ.

*Decided Feb. 1, 1875.*

Appeal from judgment.

The plaintiffs, constituting the firm of Samuel Raynor & Co., complained as follows :

"That on or about the 11th day of January, in the year 1870, at the City of New York, the defendant made his certain promissory note in writing, bearing that date, whereby he promised, three months after the date thereof, to pay to the order of William Wallace Perkins, two thousand dollars for value received, and delivered said note to said William Wallace Perkins, by whom the said note was, before the maturity thereof, indorsed to plaintiffs and delivered to them for value received.

"That when the said promissory note fell due, to wit, on the 14th day of April, 1870, the defendant agreed with plaintiffs, who were then the lawful holders and owners of said note, to pay to plaintiffs five hundred dollars on account of said note, and to have the note renewed for sixty days for the balance, being fifteen hundred dollars and interest thereon, whereupon defendant, in pursuance of said agreement, paid

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Statement of the Case.

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five hundred dollars to plaintiffs on account of said note for two thousand dollars, and received said note from plaintiffs, and made and delivered to plaintiffs a promissory note in the words and figures following, to wit:

“\$1,518.

“ ‘New York, April 14th, 1870.

“ ‘Sixty days after date I promise to pay to the order of William Wallace Perkins, fifteen hundred and eighteen dollars, value received.

“ ‘P. W. HOAGLAND.’

“That it was a part of the said agreement between plaintiffs and defendant that the said William Wallace Perkins should indorse the said last-mentioned note upon request.

“And plaintiffs further say that they have at all times since the delivery of said last-mentioned note to them, as aforesaid, held and owned, and they still own and hold the same, and that soon after receiving said last-mentioned note from defendant they presented the same to Wm. Wallace Perkins and requested him to indorse the same, but said Perkins refused to do so, and, although frequently requested, has ever since neglected and refused to indorse the same, whereof defendant had notice; by means whereof defendant became liable to pay to plaintiffs the sum of money therein mentioned on the 16th day of June, 1870, when the same became due and payable, but defendant refused, and although often requested, has ever since neglected and refused to pay the same or any part thereof.

“Wherefore plaintiffs demand judgment,” &c.

The answer admitted the making of the note and its delivery to William Wallace Perkins, but denied that said Perkins indorsed and delivered said note for value, before maturity, to plaintiffs; and averred that said note was an accommodation note, made solely for

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Statement of the Case.

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the accommodation of said Perkins, and without any consideration passing to the defendant, of which fact plaintiffs had full knowledge.

Defendant also alleged that at or about the time the said promissory note fell due, to wit, April 14, 1870, he was informed by said Perkins, that he, Perkins, had arranged with the plaintiffs, that five hundred dollars should be paid on account of said note and a renewal note given for sixty days for the balance, and that, in pursuance of said arrangement, he paid plaintiffs five hundred dollars, and made and delivered to plaintiffs the promissory note set forth in the complaint. But he denied that such payment was made and renewal note given in pursuance of any agreement made by him with the plaintiffs; and he also denied that he at any time agreed with plaintiffs, that said William Wallace Perkins should indorse the note last mentioned.

At the trial defendant moved for a dismissal of the complaint, on the ground that the plaintiffs had failed to prove title to the note; that the request to Perkins and his refusal to indorse did not operate as a transfer of the note.

The motion was denied, and defendant excepted. An abstract of plaintiff's proof is contained in the opinion.

The defendant gave no testimony, and the jury, under the direction of the court, rendered a verdict for the plaintiffs for one thousand nine hundred and twenty dollars and fifty-eight cents, to which direction defendant excepted.

Judgment having been entered on the verdict, the defendant appealed.

*Gillet & Stiger*, attorneys, and *Ira Shafer*, of counsel for appellant.

*Prichard, Choate & Smith*, attorneys, and *Duncan Smith*, of counsel for respondents.

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Opinion of the Court, by FREEDMAN, J.

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BY THE COURT.—FREEDMAN, J.—The Revised Statutes provide: “All notes in writing, made and signed by any person, whereby he shall promise to pay to any other person or his order, or to the order of any other person, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange, according to the custom of merchants” (3 *Rev. Stat.* 5th ed. 67, § 1).

“The payees and indorsees of every such note payable to them or their order, and the holders of every such note payable to bearer, may maintain actions for the sums of money therein mentioned against the makers and indorsers of the same respectively, in like manner as in cases of inland bills of exchange, and not otherwise” (*Id.* § 4).

According to the custom of merchants, when a note is made payable to the order of the maker, or of a third person as payee therein named, the name of such maker or payee must appear as the first indorsement.

But in some instances title to a note may be acquired without such indorsement. The delivery of a promissory note by the payee for a valuable consideration, without indorsement, is an assignment of the note, and conveys all his property therein. In such case the holder stands in the relation of assignee of a chose in action, and not in the relation of an indorsee, and, therefore, holds the note subject to the equities existing between the original parties (*Franklin Bank v. Raymond*, 3 *Wend.* 69). Formerly he could not maintain an action upon it in his own name. But since the Code, the action must be brought in his name, he being the real party in interest (*Code* § 111; *Savage v. Bevier*, 12 *How. Pr. R.* 166; *Marine Bank v. Vail*, 6 *Bosw.* 421).

Defendant's motion for a dismissal of the complaint

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Opinion of the Court, by FREEDMAN, J.

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was made on the sole ground, that the plaintiffs had failed to prove title to the note, or a valid transfer of the same by Perkins to them. This ground being untenable, and there being no other ground incapable of being obviated, the motion was properly denied, and as no other motion or request was made on the ground of the supposed existence of the equities hereinafter referred to, nor any evidence given on the part of the defense, the court could not do otherwise than direct a verdict for the plaintiffs.

I have thus far considered the question presented by defendant's exception to the refusal to nonsuit, from the standpoint most favorable to the defendant, namely, upon the assumption that the action was brought solely upon the second note of fifteen hundred and eighteen dollars. But such is not the fact. The complaint set out, and plaintiffs' proof at the trial established, not only the title of the plaintiffs to, and their right to recover on the said note, as against the only objection which was urged against their right of recovery, but also the facts and circumstances which led the defendant to give, and the plaintiffs to accept, the said note. These facts and circumstances furnished strong additional reasons for defendant's liability. True, they showed, among other things, that the first note for two thousand dollars had been made and delivered to William Wallace Perkins for his accommodation. But that constituted no available defense on that note as against the plaintiffs, who discounted it for the benefit of Perkins. This was fully conceded before us by the learned counsel of the defendant. Upon the maturity of that note, which had been indorsed by Perkins, the liability of the defendant and of Perkins to the plaintiffs for the amount thereof became fixed. Perkins, at defendant's request, then arranged that the plaintiffs should receive five hundred dollars on account thereof; that for the balance they



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Opinion of the Court, by FREEDMAN, J.

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should accept a new note made by the defendant to the order of, and indorsed by Perkins, and that they should deliver up the old note. This arrangement was communicated by Perkins to the defendant, and the latter not only agreed to it, but he also carried it into effect, so far as he had the power to do it. He made out a new note for fifteen hundred and eighteen dollars, payable to the order of Perkins, and delivered the same, together with the sum of five hundred dollars, not to Perkins, but at Perkins' request, to the plaintiffs, and thereupon received from them the two thousand dollar note. Having thus procured a surrender of the evidence of his original indebtedness, and voluntarily bound himself anew directly to the plaintiffs, so far as that was possible for him to do under the arrangement so made, and it being the manifest intention of all the parties when the said arrangement was made, and of the defendant when he carried the same into effect, and of the plaintiffs, when they gave up the old note and accepted the new one in lieu thereof, that Perkins should indorse the new note, the defendant can not be permitted to avail himself of the subsequent wrongful refusal of Perkins to indorse. The second note was transferred to the plaintiffs by the joint act of Perkins and the defendant, as an obligation by which the defendant meant to bind himself to the plaintiffs, and, hence, the case is not within the rule which, but for that fact, would constitute the plaintiffs mere assignees, who, as such, hold the note subject to the equities existing between Perkins and the defendant.

The remaining objections and exceptions contained in the case have not been alluded to in the points of the appellant, and, consequently, may be deemed to have been waived.

The judgment should be affirmed, with costs.

CURTIS and SPEIR, JJ., concurred.

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Statement of the Case.

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JOHN MURPHY AND JOHN NESBIT, PLAINTIFFS  
AND RESPONDENTS, v. JAMES F. KEYES,  
DEFENDANT AND APPELLANT.

PROMISSORY NOTE.

1. ACCOMMODATION, WHEN A DEFENSE.

1. Where the note is made at the *request*, and for the *accommodation*, of the *plaintiff*, without any consideration whatever between the plaintiff and the maker, such facts constitute a good defense in favor of the maker.

2. EVIDENCE, WHAT SUFFICIENT TO CARRY A CASE TO THE JURY ON SUCH FACTS.

1. Where there was evidence to the effect that *plaintiffs having a claim against A.* (the father), requested him to give them *therefor the notes of one of his sons*, as they could not use his paper, and that thereupon at an interview between one of the plaintiffs, the father and his son, at which the son made the note sued on, the father, in the presence of the plaintiff said to his son that the making of the note was a mere form, and that he, the father, would see to it, and the son would have nothing to do with it, and thereupon the *son gave the note payable to the order of the father*, knowing it was for debt due by the father to the plaintiffs, *which note was indorsed by the father to the plaintiffs*, and also evidence to the effect that before this interview the father had told the son that the plaintiffs wanted his note, and the son objected on ground that he owed plaintiffs nothing whatever on it, and the father said that the plaintiffs wanted his (the son's) note, so that they could raise money on it, inasmuch as they could not raise money on the father's note, and that it was a mere form; and also conflicting evidence as to whether plaintiffs gave a receipt for the debt for which the note was received, or took the note in payment of the debt,

HELD,

that the evidence was sufficient to carry the case to the jury on the question as to whether the note was made at the request of, and for the accommodation of the plaintiffs, without any consideration whatever between the plaintiffs and the son.

Present, FREEDMAN, CURTIS and SPEIR, JJ.

*Decided February 1, 1875.*

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Statement of the Case.

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The action was brought against James F. Keyes, as maker, and against Christopher Keyes, as indorser of a promissory note held by plaintiffs.

The defendant James F. Keyes, by answer, denied being indebted to the plaintiffs for or on account of the cause of action alleged in the complaint, and by way of separate defense pleaded: "That the note, set forth in said complaint, was made and given to the plaintiffs by this defendant at their special instance and request, and for their special accommodation, and that the said plaintiffs, never, at any time, paid or gave this defendant any value whatever for the said note, and he never received any consideration for the making and delivering of said note to the plaintiffs."

On the trial the defendant having the affirmative, his counsel called him as a witness, and he testified:

"Right after breakfast, on the day on which the note is dated, my father said to me, Mr. Nesbit is coming up here this morning and wants you to give him your note; I objected to it and said I did not owe Mr. Nesbit anything; my father said 'he said he wanted your notes, so that he could raise money on them,' because he could not raise money on my father's notes.

"When Mr. Nesbit arrived I was called down stairs, and when I came up my father's desk was open and Mr. Nesbit was sitting alongside the desk; I was kind of slow; I did not want to do it, and my father says, 'go on, it is just a mere matter of form,' and then I came to that conclusion; I did not suppose there was anything wrong, and I drew the note; I was never called upon by Mr. Nesbit to pay the note, although I saw him frequently after it became due; I was present at a conversation between him and my father about this note after it became due.

"One Sunday afternoon when Mr. Nesbit was in our house we were sitting up in the parlor and we got talking about the money my father owed Nes-

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Statement of the Case.

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bit, and they went to have a drink ; meantime they had taken a drink and Mr. Nesbit said to my father, ' If you will pay this note, I will renew the other two notes for you.' The conversation was addressed to him and not to me in regard to the note ; I frequently saw Mr. Nesbit after that time, and he never spoke to me on the subject of the note ; I never had any transactions with the plaintiffs ; I never owed them anything ; I wrote the note at the request of John Nesbit."

On cross-examination he testified :

" I knew at the time that I signed this note that my father was owing Murphy & Nesbit for bricks to a large amount, and at the same time I signed this note, I signed two other notes, each being for about the same amount. Mr. Nesbit gave me on a piece of paper the figures that my father owed the firm, and the three notes were made for the amount of those figures.

" The other note is dated December 10, for one thousand three hundred dollars ; Mr. Nesbit gave me the notes and figures to put down, and I put them down according to his instructions ; I suppose the three notes were all made for the indebtedness of my father to Murphy & Nesbit ; I suppose that was the object of them, I so understood at the time ; they were drawn payable to my father's order. After I drew the notes, Mr. Nesbit took them ; I just done it as a mere matter of form for their accommodation."

On re-direct examination, he testified :

" I had known Mr. Nesbit all my life ; he was very intimate with my father ; whatever they said to me I believed ; I had great confidence in them ; when this was stated to me by my father in Mr. Nesbit's presence that it was simply signed as a matter of form, I believed it ; and Mr. Nesbit, did not expect me ever to lift those notes ; he knew I could not lift them ; my father's notes at that time had gone to protest ; and he was discredited at the bank."

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Statement of the Case.

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Christopher Keyes, a witness, produced and sworn on the part of the defendant, testified as follows :

“I am the father of the last witness ; I know Murphy & Nesbit, and was present at the time the note in suit was signed by my son ; it was signed in the basement of my dwelling-house, No. 108 East 70th street ; the date and amount of the three notes were fixed by Mr. Nesbit ; the three notes were signed together ; at this time my son owed me nothing at all ; there was no consideration for that note as between me and my son ; I have had dealings with Murphy & Nesbit for the last twenty years, and had given them checks previous to that time which were protested.

“At the request of Mr. Nesbit, I asked my son to make these notes.

“Mr. Nesbit said he could not do anything with my note ; that my checks had been dishonored, and it would be better for me to get one of my boys to give him a note ; and this boy was the only one living in the house with me ; I thought that Mr. Nesbit would come up on Saturday night, but he left word that he would be up on Sunday morning, and I told my boy not to go away ; that Mr. Nesbit was coming up there on Sunday to get some notes ; my boy says, ‘I do not owe Mr. Nesbit any money ; I do not want to be giving notes.’ I says it is only a matter of form ; Mr. Nesbit can not raise the money on my notes, and when they come due I will pay them ; he can not raise money on my notes and wants to raise it on yours. I told my boy, in Nesbit’s presence, that it was a mere matter of form, and that I would see to it, and he would have nothing to do with it. After this note became due, Nesbit called upon me for the payment of the note, and said unless I paid the notes he would put a lien on my buildings.”

On cross-examination, he testified :

“These three notes were made for the amount of the

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Statement of the Case.

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debt I owed Murphy & Nesbit ; I asked my son to sign the notes as an accommodation of Murphy & Nesbit ; the consideration was the amount I owed Murphy & Nesbit."

Defendant then rested.

The plaintiff then called as a witness John Nesbit, who testified :

"I saw James F. Keyes draw and sign this note ; it was indorsed by Christopher Keyes then, and delivered to me.

"Q. State what took place ?

"A. Mr. James F. Keyes drew three notes ; Mr. Christopher Keyes gave me the three notes, and I indorsed and gave him a receipt on his bill for each and every note ; squared the bill up ; the bill was for the claim I had against Keyes for materials furnished ; it was stated that the notes were to me for our debt and I say I receipted the bill in full ; that was at the time the note was given."

On cross-examination, he testified :

"I put a lien on this property ; a part of that lien was a debt for which these notes were given.

"Q. The lien covers the three notes to the extent of the lien ?

"A. Yes, sir ; to the extent of the lien."

The defendant's counsel then put in evidence the notice of mechanics' lien and affidavit.

The notice was dated March 7, 1874, and the affidavit sworn to same day, and both filed same day.

James F. Keyes on being recalled, testified :

"At the time these three notes were drawn, signed, and indorsed, there was no bill against my father produced, or any receipt given."

On cross-examination, he testified :

"I mean to say that I did not see any bill ; all the papers I saw Nesbit with was a paper he handed me, a slip of paper with the amount of these notes ; he did

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Appellant's points.

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not say anything about the indebtedness ; that was the amount for which I was to draw the notes ; how much my father owed him I did not know."

Christopher Keyes, on being recalled, testified :

"At the time these notes were drawn, signed, and indorsed no bill of Murphy & Nesbit, nor any receipt was given to me."

On cross-examination, he testified :

"Mr. Nesbit did not have any bills at the time the notes were given there ; I am positive of this."

Testimony was then closed.

Plaintiff's counsel then asked the court to direct a verdict for the plaintiffs on the evidence.

Defendant's counsel insisted that the case should go to the jury, but the court ruled that there was no question for the jury and refused to permit the case to go to the jury, and defendant's counsel then and there excepted. The court ordered a verdict for the plaintiffs, to which the defendant's counsel then and there excepted.

The jury, under the direction of the court, found a verdict for the plaintiffs.

Defendant's counsel moved for a new trial on the minutes, which motion was denied.

Judgment having been entered, the defendant, James F. Keyes, appealed therefrom, and also from the order denying the motion for a new trial.

*J. F. Malcolm*, attorney, and *John E. Burrill*, of counsel for appellant, urged ;—I. The evidence clearly established that the defendant James F. Keyes received no consideration for the notes. If it be claimed that there was any doubt on that point, the defendant was entitled to have the cause submitted to the jury (*Stone v. Flower*, 47 *N. Y. R.* 566 ; *Buckman v. Jenks*, 55 *Barb.* 468, 473).

II. The claim of the plaintiffs that they had paid

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Respondents' points.

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value for the note by receiving it in payment of the debt due by Christopher Keyes to them was disputed by defendant, and there was a direct conflict on this point which entitled the defendant to have the case submitted to the jury. Same cases.

III. If it be claimed that for any other reason the plaintiffs could recover against the defendant, James F. Keyes, although Christopher Keyes could not, then we submit there was evidence sufficient to go to the jury on the question whether the note was made by James F. Keyes at the request and for the accommodation of the plaintiffs, and also on the question whether it was not made and delivered on the faith of the representations of the plaintiff that it was a mere matter of form. Same cases.

*Nelson Smith*, attorney, and of counsel for respondent, urged ;—I. The defendant's exception to the direction, by the court, for the jury to find a verdict for plaintiff, is not well taken. The defendant, James F. Keyes, was, *prima facie*, liable on the notes as maker, and he had shown nothing which released him from his liability (*Schepp v. Carpenter*, 51 *N. Y.* 602, and cases there cited). The question here presented is a simple, although an important one. Simple, as involving but one principle of law. Important, because a decision adverse to the plaintiffs will unsettle great numbers of transactions in commercial paper. It is an every-day occurrence, in business, for a creditor to take his debtor's paper with a "good indorser," to such an extent, that almost the first question which a creditor asks of a debtor who is desirous of not being pressed for a cash payment of his debt, is about the security. "Can you give me a good indorser?" It was so in this case where James F. Keyes himself says: "My father said '(Nesbit) said he wanted your notes so that he could raise money on them,' because he could not raise



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Respondents' points.

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money on my father's notes.''. The debtor, therefore, does as the creditor desires. A third party indorses—or makes—the notes for the accommodation of the debtor. It is understood between all parties that they are bound, else why go through such a useless formality? Does the law then step in and say no? Does it release the party, when he, himself, expected and intended to be bound? We submit not. This case is, however, a much stronger one than the illustration, or than the case of *Schepp v. Carpenter (supra)*. For here it was not so much “accommodation” to Christopher Keyes, as it was payment of his debt. The plaintiffs took these notes for their debt, where plaintiff, Nesbit, says “Mr. James F. Keyes drew three notes. Mr. Christopher Keyes gave me the three notes, and I indorsed and gave him a receipt on his bill for each and every note; squared the bill up.” It would not be pretended that James F. Keyes might not, if he chose, have paid his father's debt to the plaintiff in cash. But where is the difference between giving the cash and giving the note? His father's debt to the plaintiffs, if he so chose to consider it, as he did in this case, was as much a consideration in the one case as in the other. Certainly, if he had paid the cash, he could not have recovered it back on the ground of failure of consideration, or that there was no consideration. How then can he defeat a recovery on his note upon the same state of facts? He showed, therefore, no ground, defeating his *prima facie* liability on the note, and the court, in directing a verdict for the plaintiffs, committed no error. (2.) The notice of mechanics' lien made no element in the case. (a.) The rights of the parties in this case became fixed December 20, 1873, at the time when the note was made, signed, indorsed and delivered, and they could not be affected by filing of a lien long subsequently. (b.) There is nothing in the notice at all conflicting with any testimony in this case,

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Opinion of the Court, by FREEDMAN, J.

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or showing anything to defeat plaintiffs' *prima facie* right of recovery. It shows nothing, except that plaintiffs simply wished to do all they could to get their money.

BY THE COURT.—FREEDMAN, J.—If the evidence given on the part of the defense had simply showed that the appellant made the note in question for the accommodation and general benefit of his father, Christopher Keyes, that it was delivered to the latter without restrictions as to the manner of its use, and that thereupon the latter indorsed and delivered it to the plaintiffs, the appellant was clearly liable on it, though he had received no consideration for making it (*Schepp v. Carpenter*, 51 *N. Y.* 602, affirming *S. C.*, 49 *Barb.* 542; *Cole v. Saulpaugh*, 48 *Barb.* 104). But the evidence went beyond this, it tended to show, and if credited by the jury, would have authorized the jury to find that the note was made at the request of, and for the accommodation of the plaintiffs, and without any consideration whatsoever as between them and the appellant. This the appellant had a right to prove, for the consideration of a negotiable paper is examinable as between the original parties to that paper, and hence it may always be shown, as between such parties, that there was no original consideration, or that the original consideration has wholly failed.

The appellant was, therefore, entitled to have the case submitted to the jury, and the direction of a verdict against him constituted error.

The judgment and order appealed from should be severally reversed, and a new trial ordered, with costs to the appellant to abide the event.

CURTIS and SPEIR, JJ., concurred.

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Statement of the Case.

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EMMA BRUCE AND OTHERS, PLAINTIFFS AND RESPONDENTS, v. JOSEPH KELLY AND OTHERS, DEFENDANTS AND APPELLANTS.

I. EXECUTION.

1. REAL ESTATE, SALE OF UNDER, WHEN SET ASIDE, *although the judgment and proceedings leading thereto, and the execution and sale thereunder and proceedings leading thereto, are FAIR AND REGULAR ON THEIR FACE.*

1. Where property of the value of \$18,000 was sold for \$180 (the judgment being for \$108), and the attorney of the judgment creditor procured a person to become the nominal purchaser, and then set on foot and conducted an ingeniously contrived system of leases, mortgages and deeds, fair and valid on their face, but in reality wholly fictitious, and on the trial of the action to set aside the execution, neither the said attorney, nor the last grantee who was in court were called to sustain the *bona fides* of the transaction, and explain the suspicious circumstances,

HELD,

that the judgment at special term, setting aside the sale, was correct.\*

II. EVIDENCE.

1. WITNESS, WEIGHT OF TESTIMONY HOW CONSIDERED.

a. Although a witness swears that *he acted honestly and in good faith*, yet the trial judge, in passing on his credibility, has a

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\*The learned judge at special term applied the doctrines of "*omnia presumantur contra spoliatores*," holding,—1. That the law deemed that there could not be so much machination and concealment without design, and a substantial motive, viz., to prevent that being known which would set aside the sale; and 2. That, therefore, the burden of proof rested on the parties defendant to show affirmatively that nothing occurred which would invalidate the sale, not only that all the forms as to all kinds of notices, &c., were complied with, but that the sale was fairly conducted, bidders not kept away, &c., and that nothing was done to prevent notice of the proceedings reaching the owners who, upon notice, would, without doubt, rather have paid two hundred dollars than lose their property.

See special term, opinion, *post*.

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Statement of the Case.

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right to *disregard his unsupported or improbable professions, and construe his acts in the light which the facts and circumstances of the case throw upon his possible and probable motives, designs and interests.*

2. OMISSION TO PRODUCE MATERIAL TESTIMONY, EFFECT OF.

1. *Where the testimony is clearly within reach, an assumption that the omission to produce it was the result of knowledge or fear on the part of that party to the action with whom it laid to produce the testimony, that his case could not be improved by the production thereof, is justified.*

3. DECLARATIONS BY ALLEGED CONFEDERATES, ADMISSION OF BEFORE PROOF OF THE COMBINATION.

1. *Not error if the combination is subsequently proved.*

III. RESTITUTION ON SETTING ASIDE A TRANSACTION.

1. WHEN COMPLETE RESTITUTION ORDERED.

- a. *When property has been obtained by an active, fraudulent combination, all the guilty parties are answerable for the whole of it.*

1. CO-DEFENDANTS, ADJUSTMENT OF LIABILITIES BETWEEN.

- a. *If they are entitled to any such adjustment the attention of the court must be called to it.*

IV. PLEADINGS, ADMISSION BY.—TITLE.

1. *Admission of title in the plaintiff by the answer precludes defendant from insisting that the plaintiff was a mere trustee, and had no leviable interest.*

V. TRIAL.—OBJECTION NOT TAKEN BELOW.

1. *An objection that plaintiff's remedy was at law and not in equity, if not taken below, can not be raised on appeal.*

Before FREEDMAN, CURTIS and SPEIR, JJ.

*Decided February 1, 1875.*

Appeal from a judgment entered upon the decision of a judge at special term.

The action was in equity to set aside a sheriff's sale of real estate under execution, his subsequent deed to Joseph Kelly, the purchaser, a deed of the latter to the defendant, Emma Weeks, and a mortgage from her to the defendant, Joseph W. Frazier, and a deed from Emma Weeks to defendant Van Alstine, upon the ground of a fraudulent conspiracy to sacrifice the property and to obtain the title to and the possession of it for the defendants.

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Statement of the Case.

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This real estate was of the value of thirteen thousand dollars. The plaintiffs owned it, as is admitted, up to October, 23, 1869. Prior to that date, on February 20, 1859, judgment had been entered against the present plaintiffs by default, in an action pending in the supreme court, Westchester county, for the sum of ninety-eight dollars and thirteen cents. In that action Thomas M. Wyatt was the attorney of the judgment creditor. Execution was issued to the county of New York, and the real estate in question was levied on and sold. The property was purchased at the sheriff's sale for one hundred and eighty dollars, by Joseph Kelly, one of the defendants, on October 23, 1869. The fifteen months allowed for redemption expired on January 24, 1871. Kelly received his deed on April 17, 1871.

Kelly then claimed to have conveyed the premises for six thousand dollars to the defendant Emma Weeks, on May 27, 1871.

The defendant Emma Weeks claimed to have conveyed to the defendant Philip Van Alstine, for seven thousand dollars on July 18, 1871.

It was also claimed that the defendant Emma Weeks made a bond and mortgage for five thousand dollars, on May 27, 1871, the day she claims to have received her deed from Kelly to the defendant, Joseph W. Frazier. The mortgage was claimed to have been assigned by Frazier to one Colton B. Ward by an assignment bearing date May 27, 1871. It was claimed, too, that Ward executed an assignment to one Cotton W. Bean, bearing date August 10, 1871. Neither Ward nor Bean are parties to this action. These two assignments never appeared on record till April 8, 1873.

The plaintiffs claimed that these different acts, the sheriff's sale, the conveyances and the mortgage, were merely parts of one fraud, contrived by Thomas M. Wyatt, the attorney of the judgment creditor in the judgment for ninety-eight dollars and thirteen cents,

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Statement of the Case.

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and that the fraud was so contrived for the purpose of defrauding the plaintiffs of the real estate mentioned.

The court below, after making the necessary findings as to plaintiff's title, the rendition of the judgment, the filing of a transcript, the issuing of an execution, the levy and sale, and the different instruments executed to, by and between the defendants, found the following additional facts :

*Third.* That at the time of said sheriff's sale, on October 23, 1869, the plaintiffs, who were the judgment debtors in said action, were residents of the city and county of New York, as said Wyatt well knew, and had and possessed personal property much more than sufficient to fully pay and satisfy said judgment for ninety-eight dollars and thirteen cents, but such personal property was not subject to levy under execution. That no attempt was made by said sheriff to find any personal property of said judgment debtors, wherefrom to satisfy said judgment.

*Fourth.* That said sale by said sheriff under said execution of said premises, which were of the value of thirteen thousand dollars, for the price of one hundred and eighty dollars, was an oppressive use of process, and was made at the instance of said Wyatt in collusion with said Kelly, and with the wrongful and fraudulent intent on the part of said Wyatt and said Kelly that said property should be purchased at a grossly inadequate price without the knowledge of the plaintiffs, and to thereby deprive and defraud said plaintiffs of said premises under color of process of law.

*Fifth.* That said defendant Kelly made said purchase at said sheriff's sale, at the instance of and in collusion with said Thomas M. Wyatt, who was the attorney of the judgment creditors in said judgment, and with the fraudulent intent on the part of said Kelly and of said Wyatt, that said premises should be sold, and that said Kelly should purchase them at said sale for a

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grossly inadequate price, and that the plaintiffs should be kept in ignorance of said sale, and should thereby be deprived of their right to redeem said premises, and should be deprived and defrauded of the said premises under color of a judicial sale. That said purchase by said Kelly was made, not in good faith, nor with any *bona fide* intent to become the purchaser thereof at the fair value thereof.

*Sixth.* That the fair value of said premises was the sum of thirteen thousand dollars.

*Seventh.* That at the time of said sheriff's sale, there was due upon said judgment to said judgment debtors, the sum of one hundred and two dollars and eighty-six cents, principal and interest. That the amount of fees legally chargeable by said sheriff in executing and returning said writ of execution, and in making said levy and sale thereunder, were in all not more than the sum of fifteen dollars and seventy-five cents. That there remained of said amount of one hundred and eighty dollars, which was paid by said Kelly to said sheriff as the purchase money on said sale of said premises, at least the sum of sixty-one dollars and fifty-eight cents, which of right belonged to, and by law should have been by said sheriff paid to the plaintiffs, who were the owners of said premises, by said sheriffs, from the proceeds of said sale.

That said sheriff, in violation of law, retained the whole of said sum last mentioned, and willfully omitted and neglected to give any notice to said plaintiffs that said sum was due to them, or to make any attempt to pay the same, or give any such notice to said plaintiffs.

That said last mentioned acts, omissions, and neglects of said sheriff, were assented to and approved by, and were done and had at the instance of said Thomas M. Wyatt.

*Eighth.* That said defendant Emma Weeks did not, in fact, pay to said defendant Kelly the sum of six

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thousand dollars, nor any part thereof, as the consideration for said deed. That said deed from said Kelly to said Emma Weeks was made, delivered, and received, not in good faith, nor with any *bona fide* intent, thereby to grant or convey said premises to said Emma Weeks, but was made, delivered, and received, at the instance and request of said Wyatt, and in collusion with said Wyatt, Kelly and others, and with the wrongful and fraudulent intent, thereby to make it appear that said premises had been conveyed to a *bona fide* purchaser, for value, without notice or knowledge of the frauds aforesaid, and to deprive and defraud the plaintiffs of said premises, and to hinder and delay the plaintiffs in recovering said premises from the defendant Kelly, and with notice on the part of said Emma Weeks of the frauds aforesaid.

*Ninth.* That said defendant Frazier did not loan or advance to said Emma Weeks the said sum of five thousand dollars, or any part thereof. That said mortgage was made and delivered by said Emma Weeks to said Frazier, and was accepted by said Frazier, not in good faith, nor with any *bona fide* intent thereby to secure the payment to said Frazier, or any other person, of any loan of money, in fact made, but was made, delivered, and accepted, at the instance of and in collusion with said Wyatt, Kelly and others, and with the wrongful and fraudulent intent, thereby to make it appear that said mortgage was a valid lien and incumbrance upon said premises, and to hinder and delay the plaintiffs from recovering said premises, and with notice on the part of said Frazier of the frauds aforesaid.

*Tenth.* That said defendant, Van Alstine, did not pay to said defendant, Emma Weeks, the sum of seven thousand dollars, named in said deed from said Emma Weeks to said Van Alstine as the consideration thereof,



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nor any part thereof, and said deed was made, delivered and accepted, not in good faith nor with any *bona fide* attempt thereby to grant or convey said premises, but at the instance of and in collusion with said Wyatt, said Kelly and others, and with the wrongful and fraudulent intent thereby, to make it appear that said premises had been again conveyed to a *bona fide* purchaser for value without knowledge or notice of the frauds aforesaid, and thereby to defraud the plaintiffs of said premises, and to hinder and delay said plaintiffs in recovering the same, and with notice on the part of said Van Alstine of the frauds aforesaid.

*Eleventh.* That neither of the plaintiffs had any knowledge or actual notice of the recovery of said judgment, or the issuing of said execution, or said sale thereunder, or of said conveyance from said sheriff to said Kelly, or from said Kelly to said Weeks, or of said Weeks to said Van Alstine, or of said mortgage from said Weeks to said Frazier, until long after the said issuing of said execution, and said sale, and said conveyances, and said mortgage.

That said plaintiffs continued in full, quiet and peaceable possession of said premises, and the rents and profits thereof, until some time between the 1st day of May and the 1st day of June, 1871.

Upon these facts the court found as matters of law:

*First.*—That said deed from said James O'Brien to said Joseph Kelly, is fraudulent as between the parties to this action, and should be set aside, and said Kelly should execute and deliver unto the plaintiff a full release of all his interest in said premises, with covenants against his own acts, and that his wife, Ellen L. Kelly, should join in said deed and release all her right, title and interest, and right of dower, in and to the said premises.

*Second.*—That said deed from said defendant, Joseph Kelly, to the defendant, Emma Weeks, is fraudulent.

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and should be set aside, and said Emma Weeks should execute and deliver unto the plaintiffs a full release of all her interest in said premises, with covenants against her own acts.

*Third.*—That said mortgage from said Emma Weeks to said Frazier is fraudulent, and should, as between the parties to this action, be set aside, and said Frazier should execute and deliver to the plaintiff a full release of all his interest in the premises, and in and to said mortgage.

*Fourth.*—This said deed from said Emma Weeks to said Philip Van Alstine is fraudulent, and should be set aside, and said Philip Van Alstine should execute and deliver unto the plaintiffs a full release of all his interest in said premises, with covenants against his own acts to the present owner and holder of said mortgage, for principal and interest due on the said bond, purporting to be secured by said mortgage.

*Fifth.*—That an account be taken before a referee to be appointed by this court, of the rents and profits which have been received, or which might have been received, by the defendants or any of them, of said premises, and of any damage or waste done or suffered to said premises while any of said defendants have been in the possession of said premises through their lessees or otherwise, and that the plaintiffs are entitled to judgment against the defendants, Joseph Kelly, Emma Weeks and Philip Van Alstine, severally, for the amount of such rents, profits, damage and waste found upon such accounting to be charged against them severally.

*Sixth.*—That the plaintiffs are entitled to judgment, in accordance with the foregoing findings, and for their costs and disbursements of this action against the defendants, Joseph Kelly, Weeks and Van Alstine, but that the plaintiffs recover no costs against defendant

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Frazier, but the defendant, Frazier, is not to recover costs against the plaintiffs. And I do hereby order and direct an additional allowance to be made to the plaintiffs of five hundred dollars.

Judgment having been entered in accordance with the decision, the defendants appealed.

The following opinion was rendered at special term :

SEDGWICK, J.—The defendant Kelly, in testifying, gave out at first, if he did not assert, that his relations with Mr. Wyatt were slight and casual. As long as possible he withheld the bank-book, which led to proof from himself, that in fact those relations were intimate and confidential. The examination of the records made by him was clearly not for the purpose of informing himself, but to give him the semblance of a person acting independently and in his own interests.

I am convinced that the conveyance to Mrs. Weeks, and the mortgage to Mr. Frazier, did not represent substantial transactions, but were mere forms. Carter and Kelly may have moved on different lines, without personal communication, up to the time of the conveyance and mortgage, but they were consciously co-operating when they met with the others ; they took part in, as it were, a dramatic representation, which might afterwards be narrated as a real transaction.

I do not know who owned the money used on that occasion, but am satisfied that it was not lent to Mrs. Weeks, except as a form, and that it was not paid over to Kelly to be kept by him as the consideration of the conveyance.

The Dunn lease evidently was a device by which the premises were left vacant, that the parties claiming under the sheriff's sale might obtain possession without a resort to the law.

On the whole case, I believe that Mr. Van Alstine

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took his conveyance with notice of the real situation of the facts.

In combining all the circumstances, I can not avoid the conclusion that the parties acted as directed by Mr. Wyatt, and in concert with him, from the first, and that at first Kelly became purchaser upon instructions from him and as jointly interested with him, since the first, the real parties interested, have retained their interest in a part of it.

These being the results of the testimony, the law applies the rule *omnia presumantur contra spoliatores*. The law does not deem that there can be so much machination and concealment without design and a substantial motive, viz., to prevent that being known which would set aside the sale. The burden of proof rests upon the parties defendant to show affirmatively that nothing occurred which would invalidate the sale, not only that all the forms as to all kinds of notices, &c., were complied with, but that the sale was fairly conducted, bidders not kept away, &c., and that nothing was done to prevent notice of the proceedings reaching the owners who, upon notice, would without doubt, rather have paid two hundred dollars than lose their property. Every intentional deviation from the usual and ordinary course of affairs, is a circumstance of testimony that there is a weak point to be hid. At this point it becomes a very important consideration, that the defendant, acting, as we have seen, in concert with Mr. Wyatt, did not call him as a witness. He is the only one who could affirmatively show that there was no legal or equitable cause for setting aside the sales. The witnesses who were called on that point show that such of those forms were complied with as, in favor of a *bona fide* purchaser, create a presumption that the sale and the subsequent proceedings were regular, but, as we have said, that does not cover the ground to be established.

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Opinion of the Court, by FREEDMAN, J.

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The conveyances to Kelly, Mrs. Weeks and to Mr. Van Alstine, should be set aside, and also the mortgage to Mr. Frazier, as between the parties to this action. The plaintiff should have costs against the defendants, excepting Mr. Frazier, but he is not to have costs.

*Erastus New, Henry F. Pultzs, J. B. McEwen, Philip Van Alstyne*, attorneys, and *W. A. Beach*, of counsel, for appellants.

*Hammond and Stickney*, attorneys, and *Albert Stickney*, of counsel, for appellants.

THE COURT.—FREEDMAN, J.—The court at special term found, that the sale was an oppressive use of the process of the court, made at the instance of Wyatt, the attorney, in collusion with Kelly, and with a wrongful and fraudulent intent on the part of both of them; that the conveyance to Mrs. Weeks, the mortgage to Frazier, and the conveyance to Van Alstine, did not represent substantial transactions, but were mere forms, and as such they were gone through with to defraud the plaintiffs out of said premises, and to hinder and delay them in recovering the same; and that in these various matters all the defendants acted in collusion and concert with, and as directed by, Wyatt.

The evidence is sufficient to sustain these findings.

True, Kelly and Frazier, who of all the defendants were the only ones that were called to the witness-stand, claimed to have acted honestly and in good faith. But the judge who had them before him, and who observed the manner and the tone of their testimony, had the right to pass upon the credibility, and in doing so, he had the right to disregard their unsup-

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ported or improbable professions, and to construe their acts in the light which the facts and circumstances of the case threw upon their possible and probable motives, designs, and interests. Upon the whole testimony, which is by far too voluminous to be satisfactorily adverted to here, it is impossible for any candid mind to believe that there could have been so much plotting and concealment, and yet so much harmony and concert of action, to accomplish a certain result, as the case discloses, without the presence of a master-mind, who organized and perfected the whole plan, and who from time to time set the parties in motion as circumstances seemed to require. That this master-mind was Wyatt, is a conclusion which, on a critical examination of the testimony, can not be resisted. He it was, therefore, that more than any other witness could have shown by explanatory testimony, if the fact could be shown at all in the face of the facts already established by the plaintiffs, that no legal or equitable grounds existed for setting aside the sale and the subsequent conveyances. The defendants, however, did not call him as a witness, nor did they account for such omission. Neither did Van Alstine, though present in court, see fit to take the stand. In view of this failure to produce material testimony clearly within reach, the court was justified in assuming that such failure was the result of knowledge or fear on the part of the defendants that their case could not be improved by the production of such testimony. On the other hand, upon the case as left by the defendants, the conclusion was almost unavoidable that all the defendants had been engaged in the fraudulent combination at the instigation of Wyatt.

This being so, the findings of fact made below can not be disturbed. Nor can I discover any error in the conclusions of law based upon the facts as found. The relief awarded in this case was not awarded against a

purchaser for value, nor against a purchaser at all, nor against an innocent party who had received, without fault, through the fraud of another, property which in equity belonged to the plaintiffs. It was a case of an active, fraudulent combination, and in such a case the law gives complete restitution, and all the guilty parties are made answerable for the whole of the property (*Troup v. Wood*, 4 *Johns. Ch.* 260).

If any of the defendants were entitled to an adjustment of liabilities as between themselves, the attention of the court should have been directed to it, which was not done.

The defendants have argued that the legal estate of the property in question was in Mr. Bruce, as trustee for the plaintiffs, and that the plaintiffs had no leviable interest in the realty. But they are not in a position to raise this question, having by their answers admitted title in the plaintiffs (*Paige v. Willet*, 38 *N. Y.* 28; *Thomas v. Austin*, 4 *Barb.* 265).

The objection that the plaintiffs should have sought their remedy at law is equally untenable. The point was not raised below, and defendants submitted to the equitable jurisdiction of the court without complaint.

Finally, it is insisted that the court erred in admitting the declarations of the alleged confederates before proof of the combination. But this was a matter resting in the discretion of the court. Evidence of a conspiracy must have a beginning. The remarks and declarations of conspirators, directions given by them, and their conversations held during the carrying out of the conspiracy, are acts and as such part of the *res gestæ*. If the conspiracy is finally, on all the evidence, clearly made out, the order in which the proof was given, is not material. It therefore rests solely in the discretion of the court to determine whether or not, at a particular stage of the proceedings, a sufficient

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foundation has been laid to admit evidence of such declarations (1 *Greenl. on Ev.* § 111).

The judgment should be affirmed with costs.

CURTIS and SPEIR, JJ., concurred.

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THE ATLANTIC AND PACIFIC TELEGRAPH  
COMPANY v. WILLIAM E. BARNES, JAMES  
A. BARNES, AND HENRY BISCHOFF, JR.

SURETIES ON BOND FOR THE FAITHFUL PERFORMANCE  
BY THE PRINCIPAL OF CERTAIN DUTIES AND TRUSTS,  
AND THE ACCOUNTING AND PAYING OVER OF ALL  
MONEYS OF THE OBLIGEE COMING TO HIS HANDS.

WHAT DOES NOT DISCHARGE THEM FROM LIABILITY.

Where the principal, after the execution of the bond, received in the course of his employment, moneys of the obligee which he failed to account for and pay over, which was well-known to the obligee,

HELD,

that the obligees thereafter *keeping the employee in his service, without notifying the sureties of such default, did not discharge* them from liability for future default, *it not appearing* either that the omission to give notice *resulted in any injury* to the sureties, or that the default *was fraudulent* in its character.\*

Before FREEDMAN, CURTIS, and SPEIR, JJ.

*Decided February 1, 1875.*

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\* Whether the sureties would have been discharged if either the element of fraud in the default; or that of injury resulting from the omission to give notice, or both, had existed, seems to have been regarded by the court as not presented by the case for decision.



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Exceptions ordered to be heard at general term.

In this case a verdict of two hundred and sixty-nine dollars and sixty-seven cents was directed for the plaintiff, at the trial term, exceptions to be heard in the first instance at general term, and judgment to be meantime suspended.

The plaintiff moved for judgment.

No testimony was taken, but the case was tried upon admissions made by the respective parties.

From these it appeared that the defendant, William E. Barnes, entered the plaintiff's employ December 23, 1873, and that he and the co-defendants, James A. Barnes and Henry Bischoff, Jr., executed a bond conditioned, that so long as said employment continued, said William E. Barnes should well, truly, and faithfully perform all the duties assigned to, and trusts reposed in, him by the plaintiff, and in particular should faithfully account for all moneys and property of said plaintiff which should come to his hands.

Upon this bond the present action was brought to recover the sum of two hundred and sixty-nine dollars and sixty-seven cents, in which amount William E. Barnes was indebted to the plaintiff at the time of his discharge (which occurred March 24, 1874), on account of moneys of the plaintiff which had come to his hands while the employment continued.

The defendants, James A. Barnes and Henry Bischoff, Jr., were duly notified of the deficiency, and payment of said sum was duly demanded, and refused.

When one month of the employment had expired (January 30th), said William E. Barnes was behind-hand in his accounts with the plaintiff to the amount of fifteen dollars and ninety-two cents, and plaintiff had knowledge of this fact, but did not notify said James

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Defendant's points.

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A. Barnes and Bischoff; and it is claimed by these defendants, who alone have answered the complaint, that by reason thereof they as sureties are discharged.

*McDaniel, Lummis, and Souther*, attorneys, and *Charles Edward Souther*, of counsel for plaintiff, urged;—I. Defendants' undertaking is absolute, by the express terms of the instrument. All are bound originally and no one collaterally. The defense of suretyship is, therefore, not pertinent.

II. But regarding defendants as sureties, their liability on the bond has not terminated. Nothing in the admitted facts constitutes a defense to the action (*Albany Dutch Church v. Vedder*, 14 *Wend.* 165; approved, *Looney v. Hughes*, 26 *N. Y.* 522, and cases there cited; *Schroeppell v. Shaw*, 3 *N. Y.* (3 *Comst.*) 446; *Remsen v. Beekman*, 25 *N. Y.* 552, 557; *Black River Bank v. Page*, 44 *N. Y.* 453). Of course there is no question but that the action is well brought. The bond being joint and several, all the obligors are properly included as defendants in a single action (*Code*, § 120; *Carman v. Plass*, 23 *N. Y.* 286; *Brainard v. Jones*, 11 *How. Pr.* 569).

*J. Edwin Leary*, attorney and of counsel for defendants, urged;—I. Equity holds the creditor or employer to good faith towards the sureties, and to the exercise of so much diligence and care in the management of his affairs as a prudent man would ordinarily make use of, and although the creditor could not be held to exercise active diligence in investigating the accounts of his servant or manager, still when knowledge of a default or dishonesty is brought to the knowledge, or confessed to the creditor or employer, the sureties are not responsible for any subsequent defalcation or dishonesty if the employment is continued (*Story Eq. Jur.* §§ 324-326; 2 *Vernon. (Eng.)*

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Opinion of the Court, by CURTIS, J.

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518; 3 *Eng. R.* 272; 7 *Law R. Q. B.* 666; 10 *Clark & F.* 934; 11 *Am. R.* 237).

II. There is an implied covenant on the part of the creditor or employer with the sureties that he will conduct his affairs in the ordinary manner and that he will use ordinary due care and diligence during the employment of the principal for whom the sureties bound themselves (*Fell on Guaranty & Suretyship*, 229).

III. That the admissions on the part of the plaintiff constitute a sufficient negligence and laches in law to discharge the sureties from all defalcations subsequent to the first default which occurred, and of which the plaintiff had knowledge January 30th, 1874, as admitted (2 *Ver.* 518; 3 *Eng. R.* 272; 7 *Q. B.* 666).

IV. By neglecting to discharge and dismiss the defendant, William E. Barnes, from the employ of the plaintiff upon discovery of the first default, and by continuing said William E. Barnes in their employment thereafter, the plaintiff condoned the offense for which they could have discharged him, and thereby entered into an agreement with him to forbear prosecution against said William E. Barnes for the amount of the first default, and should the sureties, the defendants, James A. Barnes and Henry Bischoff, Jr., have discovered the default of the said defendant, William E. Barnes, and demanded his discharge and that the plaintiff prosecute him at once, and that they be absolved from further liability, the plaintiff would have been unable so to do owing to such condonation and agreement to forbear, and thus the rights of the sureties would become compromised (*Burge on Suretyship*, 203; 18 *Ves.* 20; 7 *Hill*, 250; 9 *Clark & F.* 1, 45, 47; *Fell on Guaranty & Suretyship*, 449, 518).

BY THE COURT.—CURTIS, J.—The three defendants

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Opinion of the Court, by CURTIS, J.

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jointly and severally executed a bond, conditioned that one of their number, William E. Barnes, would faithfully perform certain duties and certain trusts, and account for all moneys belonging to the plaintiffs coming into his hands.

Two of the defendants answer claiming that they are discharged from liability, because on an occasion previous to the one in question, Barnes was indebted and in default to the plaintiffs in the sum of fifteen dollars and ninety-two cents, of which they were not notified at the time, though plaintiff knew about it, and Barnes was kept in plaintiff's employment. The facts thus alleged by the answer are admitted. No other evidence was introduced at the trial.

The difficulties of sustaining the defense are, that it is not shown that this indebtedness of Barnes for fifteen dollars and ninety-two cents prejudiced or injured in any way the other two defendants, or that Barnes is not able and ready to indemnify and save them harmless, and further that there is no provision in the bond that any notice of default should be given them, and that it was their duty if they wished to protect themselves, either to have required this, or else to have looked into Barnes's accounts, and found the extent of his defaults, and required the plaintiff to prosecute, when they would have had a defense in equity.

It does not appear that Barnes was guilty of a fraud in owing the plaintiff the fifteen dollars and ninety-two cents. They knew of it, and for aught that appears, there were proper reasons why he should have retained that sum. If every omission, or negligence, or failure of duty, however trivial, on the part of the person for whose conduct sureties have become responsible, is to operate to exonerate them from future liability unless they are forthwith notified, or the employee discharged, then very little protection would result from that form of security. A collusion between two employees, as

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Dissenting opinion of FREEDMAN, J.

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for example, the cashier and the collecting clerk of a corporation, would defeat all recourse by the defrauded stockholders against the sureties of these officers.

But whatever may have been the earlier decisions in this State, the law in respect to the liabilities of sureties appears to be settled. In *The People v. Berner*, 13 *John*. 383, it was held that negligence in not calling upon their principals, after numerous defaults, did not exonerate them unless an injury resulted from the negligence. In *The Albany Dutch Church v. Vedder* (14 *Wend*. 169, 171), the plaintiffs neglected to call their treasurer to account for seven years after his defaults from year to year, until he became insolvent, when by their own by-law he was bound to render his account every six months, and it was held, that, whatever may have been the moral duty of the plaintiffs to have called their officer to account, "it was the legal duty of the defendants, the sureties, to have examined into the state of the accounts of the person for whose correctness they had become responsible," and that the facts pleaded constituted no defense in law.

This case appears to have been carefully considered, the previous adjudications were to some extent reviewed, and there seems to have been no decision since, that changes or affects the obligations of sureties, by reason of any of the matters shown in the present action.

If these views are correct, the exceptions should be overruled, and the plaintiff should have judgment on the verdict, with costs.

SPEIR, J., concurred.

FREEDMAN, J. (dissenting).—By the bond in question the obligors named therein, among other things, not necessary to be mentioned, bound themselves, jointly and severally, in the sum of three hundred dol-

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Dissenting opinion of FREEDMAN, J.

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lars, that William E. Barnes should "faithfully account for all moneys and property belonging to said Atlantic and Pacific Telegraph Company, which shall come to his hands, whether the same shall be paid or delivered to him by said Atlantic and Pacific Telegraph Company, to be disbursed or used for its account, or shall be received by him from other persons for the use and benefit of said Atlantic and Pacific Telegraph Company, or shall come to his hands in any other manner."

It is admitted that William E. Barnes, at the time of his discharge, viz., March 24, 1874, was indebted to the plaintiff on account of moneys which had come to his hands during his employment, in the sum of two hundred and sixty-nine dollars and sixty-seven cents.

The defendants insist, however, that they are not liable beyond the sum of fifteen dollars and ninety-two cents, because on January 30, 1874, William E. Barnes was in default to the plaintiff in the sum of fifteen dollars and ninety-two cents, of which plaintiff had knowledge, but of which fact plaintiff gave no notice to the defendants, and because the employment of William E. Barnes was continued with such knowledge until his default amounted to two hundred and sixty-nine dollars and sixty-seven cents.

In my judgment the defendants' claim is well founded.

It is undoubtedly true, as plaintiff claims, that the undertaking of the defendants is absolute by the express terms of the instrument. In such case the rule in this State has always been that when one guarantees the act of another, his liability is equal to that of his principal, and that he is not entitled to notice of the principal's default as a condition precedent to the bringing of an action against him, unless the contract expressly provides for such notice. If the guarantor intends to insist on such notice, he must expressly

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Dissenting opinion of FREEDMAN, J.

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make it a condition of his contract (Union Bank of Louisiana v. Coster, 1 *Sandf.* 562, affirmed in 3 *N. Y.* 203; Allen v. Rightmere, 20 *Johns.* 366; Douglass v. Howland, 24 *Wend.* 36; Smith v. Dann, 6 *Hill*, 544; Sterns v. Marks, 35 *Barb.* 565; Heebner v. Townsend, 8 *Abb.* 238; East River Bank v. Rogers, 7 *Bosw.* 493; Brown v. Curtiss, 2 *N. Y.* 225).

So it may also be conceded that, even where a different rule prevails, as for instance in the courts of the United States, all that the law requires is that the guarantor shall have reasonable notice of the failure of the principal debtor and of the intention of the guarantor to enforce the guaranty. What that notice should be, or when it should be given, is not settled, as it is by the law merchant in the case of an indorser of negotiable paper, and consequently the question of reasonable time is left to be varied according to the facts of each particular case. The rule to be deduced from the authorities upon this point, is that the guarantor, though entitled to notice, can not defend himself by the want of it, unless the notice and demand have been so long delayed as to raise a presumption of waiver or of payment, or unless he can show that he has lost by the delay opportunities for obtaining securities, which a notice, or an earlier notice, would have given him. Under the operation of this rule a very brief delay has sometimes been held fatal to the claim of the guarantee, if it appeared that the notice could easily have been given, and that, if given, it would have saved the guarantor from loss. But in every such case the proof showed that actual negligence had caused actual injury.

And finally it may be conceded that a surety does not possess the right to debar the principal debtor from all favor or indulgence. It was once uncertain whether a forbearance of the debt did not discharge the surety. But it is now well settled that a mere for-

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Dissenting opinion of FREEDMAN, J.

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bearance leaving to the creditor the power of putting his claim in suit at any time, does not have this effect. In no case is a surety discharged by mere laches of the creditor, unless after a request to prosecute the principal (*Looney v. Hughes*, 26 *N. Y.* 514; *Remsen v. Beekman*, 25 *Id.* 552; *Schroeppell v. Shaw*, 3 *Id.* 446; *Albany Dutch Church v. Vedder*, 14 *Wend.* 165). And such request imposes no absolute duty upon the creditor to proceed at once, if delay is consistent with good faith (*Black River Bank v. Page*, 44 *N. Y.* 453).

But these several propositions which have been advanced by the plaintiff, though true as abstract propositions of law, do not touch the real question presented by the exceptions in this case.

A guaranty of the fidelity of a servant is to be presumed as founded on the trustworthiness of the servant so far as that was known to the contracting parties at the time of the contract. Any concealment, inconsistent with good faith, practiced by the employer upon the surety at the time of the making of the contract, has the effect of releasing the latter; and one of the reasons usually given for so holding, is that it is only reasonable to suppose that the fact so concealed, if known to the surety, must necessarily have influenced his judgment as to whether he would have entered into the contract or not. If this doctrine is sound, and it is not only sound, but is established law, it seems equally reasonable to suppose that it never could have entered into the contemplation of the parties that, after the servant's dishonesty in the service had been discovered, the guaranty, though on its face a continuing one, should continue to apply to the servant's future conduct, when the master chose for his own purpose to continue the servant in his employ, without the knowledge or assent of the surety. If the obligation of the surety is continuing, the obligation of the creditor should be equally so, and the



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representation and understanding on which the contract was originally founded, should continue to apply to it during its continuance and until its termination.

This will still more strongly appear, when, in connection with the proposition last discussed, it is considered that in certain cases and under certain circumstances the right of revocation exists. In Parsons on Contracts, vol. 2, p. 31, the rule is stated as follows: "If the guaranty be to indemnify for misconduct of an officer or servant, this promise is revocable, provided the circumstances are such that when it is revoked, the promisee may dismiss the servant without injury to himself on his failure to provide new and adequate sureties." It was for this reason, that in *Burgess v. Eve*. (Law Rep., 13 *Eq.* 450), MALINS, V. C., says: "But if there is misconduct on the part of the person whose fidelity is guaranteed: for instance, if a man guarantees that a collecting clerk shall duly account for all moneys received by him, and that a collecting clerk is found to have embezzled his employer's money, reason requires that the man who entered into the guaranty, because he believed the person to be of good character, when he finds that he is not so, and not to be trusted, should have the power of saying: 'I now withdraw the guaranty I gave you; I give you full notice not to trust him any more.' Notwithstanding all that has been said, I am clearly of opinion, that a person who has entered into such a guaranty, and who is therefore responsible for the person whose fidelity is guaranteed, has a right to withdraw from that guaranty, when that person has been proved guilty of dishonesty." He afterwards proceeds: "My opinion is—and I have no hesitation in expressing it—that a person who gives a guaranty, would have a right to say to the person taking it, 'You will continue at your own peril to employ the person on whose

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Dissenting opinion of FREEDMAN, J.

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behalf I gave the guaranty, provided that the clerk or other person has been guilty of embroilment or gross misconduct, or has turned out to be unworthy of the confidence reposed in him by the person giving the guarantee for him.' If the employer, under such circumstances, refused to give the guarantee up, the person giving it would have a right to file a bill in this court, and in my opinion would succeed in the contest, because the court would direct the bond to be delivered up to be canceled. And I think that is only what good sense, propriety, and fair dealing between man and man would dictate."

This opinion, though not necessary for the decision of the case before the Vice-Chancellor, was adopted (as founded on equity and good sense) by the court of queen's bench in *Phillips v. Foxall* (3 *Eng. R.* 272; S. C. 7 *Law R. Q. B.* 666), which was a case almost identical in its legal aspects with the case at bar.

In that case it was distinctly held, after an examination of many authorities, that "in case of a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guaranty relates, and if, instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he can not afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service." As to the alleged right of revocation the court of queen's bench came to the following conclusion: "The discharge of the surety in the present case seems to us to arise rather out of the nature and equity of the contract between the parties than upon any assumed right of revocation. We think the surety is discharged unless he assents or agrees, after he has

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Dissenting opinion of FREEDMAN, J.

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had knowledge of the dishonesty, that the guaranty shall hold good for the subsequent service; but, as a revocation of the guaranty as soon as the dishonesty has come to his knowledge, will be the best evidence of dissent, whether his discharge from the contract is founded on express revocation or want of assent after notice of the dishonesty, seems rather a question of words than of substance."

The present case is within the limitation of the rule laid down by Parsons as above stated, and in all respects covered by the decision in *Phillips v. Foxall*. When on January 30, 1874, the plaintiff became fully aware that William E. Barnes was in default to the extent of fifteen dollars and ninety-two cents, good faith and the true intent and meaning of the contract of guaranty required either that William E. Barnes should be dismissed, or that notice of the defalcation be given to the defendants. True, they were bound to the extent of that defalcation without any notice whatever. But it is equally true, that after a breach of the contract of guaranty had once taken place and a liability had once attached under it, which the defendants then and there had the right to terminate and discharge by payment, the plaintiff could not, by a suppression of the fact of an existing defalcation, keep the guaranty alive and continuing so as to cover possible future contingencies not contemplated by the original contract. "It is the clearest and most evident equity" (says Lord LOUGHBOROUGH, in *Rees v. Berrington*, 2 *Ves.* 540) "not to carry on any transaction without the knowledge of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You can not keep him bound and transact his affairs (for they are as much his as your own), without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement."

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Dissenting opinion of FREEDMAN, J.

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The case of Pittsburgh, Fort Wayne & Chicago R. R. Co. v. Schaeffer (8 *Am. Law Reg. N. S.* 110), differs in many essential particulars from the case at bar. It was, as stated by the court, a case of simple indulgence and forbearance, and that under circumstances which were not such as to call for any extraordinary diligence. The corporation itself had no knowledge of previous defalcations and it was for this reason that SHARSWOOD, J., held, "The fact that there were other unfaithful officers and agents of the corporation who knew and connived at his (the principal debtor's) infidelity, ought not in reason, and does not in law or equity relieve them (the sureties) from the responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by conspiracy between the officers of a bank, or other moneyed institution, all their sureties might be discharged."

The People v. Berner (13 *Johns.* 382), and Albany Dutch Church v. Vedder (14 *Wend.* 169), also differ for about the same reason. They merely hold that, in the absence of actual knowledge, mere negligence on the part of the creditor, however long continued, will not discharge the sureties.

The admission made in the present case, is that the plaintiff's corporation *had knowledge* of the first default of fifteen dollars and ninety-two cents, and that with such knowledge the employment of William E. Barnes was continued until his default amounted to two hundred and sixty-nine dollars and sixty-seven cents. The word "default" was used to raise a question of law and to obtain a ruling thereon. It, therefore, did not mean an innocent default, and as the court, in making the ruling, in effect held that the first default, no matter how grave or fraudulent, did not exonerate the sureties, it is too late to urge on appeal for the first time that the default meant might

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Dissenting opinion of FREEDMAN, J.

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have been an innocent one. The defendants are therefore not liable beyond the sum of fifteen dollars and ninety-two cents, except upon proof of their assent, with knowledge of the facts, to the continuance of the employment after the first defalcation. Such assent, if given, would have revived and continued their liability. For it is well established that a surety, after he has been discharged from his contract by the act of the creditor, may revive his liability by a subsequent promise or assent (*Mayhew v. Crickett*, 2 *Swan*. 185; *Smith v. Winter*, 4 *M. & W.* 454).

No such proof having been given by the plaintiff, defendants' exceptions should be sustained, the verdict should be set aside, and a new trial ordered, with costs to defendants to abide the event. But in case the plaintiff elect to consent to a reduction of the verdict to fifteen dollars and ninety-two cents and interest, plaintiff may have final judgment for that amount. In such case the defendants are entitled absolutely to the costs of the general term.

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Statement of the Case.

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GEORGE N. WESTON AND OTHERS, PLAINTIFFS AND  
RESPONDENTS, v. FREDERICK O. KETCHAM  
AND OTHERS, DEFENDANTS AND APPELLANTS.

“PEPPER’S SIGNAL OIL.”

I. TRUSTEE. IMPLIED TRUST.

1. PARTNERS. When *one partner*, during the partnership, negotiates respecting, and obtains the *exclusive use* of a right in which the firm was interested, he will be declared *to hold such use in trust for the firm*.

a. TRADE-MARK. PRINCIPLE APPLIED TO IT.

1. When a firm under a contract with the owner has the right to the exclusive use of a trade-mark, and during the partnership one of the firm enters into an agreement with the owner, whereby the previous contract is cancelled and a new one made, giving to such member the exclusive use of the trade-mark for a certain number of years, on certain conditions, and at the end of that term the conditions having been performed, the sole and exclusive right and title to the trade-mark,

*Held,*

that such partner took and held the contract, and all the rights and interests given thereby, as *trustee for the firm*.

II. RATIFICATION BY ACQUIESCENCE.

1. FORCED ACQUIESCENCE WILL NOT OPERATE AS.

1. In the trade-mark case above put the other partners after knowledge of the contract made by their copartner, *expressed their disapprobation*, but *did not* immediately resort to their legal remedy, and notwithstanding the act of their copartner *still continued* the firm, and in its business used the trade-mark, and manufactured under it as before, and paid to the owners out of the firm’s funds the sums stipulated to be paid, *yet it appearing* that the copartner who procured the contract for his own benefit *alone knew the secret* of the manufacture,

*HELD,*

*A forced acquiescence, which would not sustain a finding of ratification.*

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Statement of the Case.

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1. If they had moved in the matter adversely, they would in asserting their remedy, not have possessed the knowledge by the use of which the *capital employed* in the manufacture (all of which was contributed by them), *might be made remunerative*.

## III. TRADE-MARK.

## 1. RESTRAINING USE OF, WHAT NOT CAUSE FOR.

1. Although defendant *does not know the secret* of the manufacture, and is selling under the trade-mark *an article different* from that represented by it, *yet* (whatever may be the effect of these elements in other cases) *no cause of action arises* therefrom against him in favor of one who has *no more right to the trade-mark than he has*.

## IV. TRIAL BY COURT.

## 1. MODE OF REVIEWING DECISION.

1. Only by *appeal* from the judgment entered on such decision, or under *section 268* by motion at *general term* for a new trial.
  1. Therefore *a motion* on a case, or exceptions, for a new trial, *will not be entertained at special term*.

Per FREEDMAN, J., concurred in by CURTIS, J.

Before FREEDMAN and CURTIS, JJ.

*Decided February 1, 1875.*

Appeal by defendants from a judgment, and from an order at special term, denying a motion for a new trial.

The action was commenced in March, 1874, for a perpetual injunction to restrain the defendants from using a trade-mark, to wit, "Captain S. Pepper's Extra Signal Oil," and for damages for their alleged previous wrongful use of the same.

The findings of the judge were as follows :

1. That Simeon Pepper in his life time with the aid of his wife Abbie A. Pepper, and of George N. Weston, one of the plaintiffs, experimented for the purpose, and succeeded in compounding and manufacturing an illuminating oil, valuable as an article of merchandise,

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Statement of the Case.

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and in the course of his business as a manufacturer of and dealer in that and other oils at the city of New York, sold the same under the name and designation of "Pepper's Signal Oil," "Captain Pepper's Extra Signal Oil," and "Captain S. Pepper's Extra Signal Oil," from the time he produced the same, to the beginning of the year 1870.

II. That about the last mentioned time, said Pepper formed a business connection with the defendant Ketcham, whereby he, Pepper, was to manufacture the said oil, and the said Ketcham was to sell the same, and the profits were to be divided equally between them, and that agreement was in force and operation, the oil being so manufactured by Pepper and sold by Ketcham as "Pepper's Extra Signal Oil," until the death of Pepper, in September, 1870, up to which time the plaintiff Weston remained in Pepper's employ, and was engaged with him in manufacturing said oil.

III. That on or about September 1, 1870, the plaintiff Weston and the defendant Ketcham, entered into a written agreement for a co-partnership between them, under the firm name of F. O. Ketcham and Company, to deal in oils, at the city of New York, in which agreement it was provided that Ketcham should furnish the capital, and Weston should devote his time, knowledge and skill, to the manufacture of "Pepper's Signal Oil," and other oils, the terms of which co-partnership, were equal as to division of profits and liability for losses, and at the same time they, as such co-partners, entered into an agreement with Abbie A. Pepper, afore-mentioned, the widow of Captain S. Pepper, by which they agreed to pay to her one-tenth part of the net profits of their whole business, in consideration that she should and would give to them as long as said agreement lasted, the exclusive use of all her right, title, and interest, in and to the use of the name of her husband as a trade-mark upon the said



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signal oil, so to be manufactured by Weston in their said business, and not to impart to any one the secret of said manufacture.

And the said co-partnership thus formed, and the continuation thereof hereinafter mentioned, then used the following device as a trade-mark, under which they vended the said oil so manufactured, except that the word "Sole" was invariably printed before the word "manufacturers," to wit :



IV. That on or about July 1, 1871, the plaintiff Fiske became a member of the said co-partnership firm of F. O. Ketcham & Co., being admitted thereto upon equal terms, as to profits and losses, with the other two co-partners, but the said agreement with the said Abbie A. Pepper, was not then changed, nor were the duties of said Weston in respect to his manufacture of said signal oil.

V. That on or about January 1, 1872, the said agreement between the co-partnership firm of F. O. Ketcham & Company, and said Abbie A. Pepper, afore-mentioned was cancelled, and a new agreement in

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Statement of the Case.

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writing was entered into by and between her and the plaintiff Weston, as parties thereto, in and by which, for the consideration of one hundred and fifty dollars, to be paid in equal monthly instalments during a period of five years thence next ensuing, she, the said Abbie A. Pepper, agreed to allow to said Weston, or to any firm of which he then was or might become a member, the exclusive use of the name of Captain Simeon Pepper, in the manufacture of signal oil, as a trade-mark, and that at the end of said five years, provided said Weston should faithfully keep said agreement, she, said Abbie A. Pepper, would render and yield up to him the said trade-mark for his own use, benefit, and behoof forever.

VI. That said agreement directly upon its execution came to the knowledge of the said Fiske, and said Ketcham, and they each severally ratified the same, and thenceforth all the time of the subsequent continuance of the said co-partnership of F. O. Ketcham & Company, composed of said Frederick O. Ketcham, George N. Weston, and Thomas P. Fiske, as co-partners, they paid the said monthly instalments, and had and used in their business said trade-mark, as hereinbefore set forth.

VII. That said co-partnership, last aforesaid, continued to February 20, 1874, when by written articles of agreement the same was dissolved, the said Weston & Fiske, parties on the one part, and the said Ketcham party on the other, specially retaining and reserving any right or rights either party had in or to said trade-mark and its use.

VIII. That on or about the said February 20, 1874, the plaintiffs entered into a co-partnership under the firm name of Weston & Fiske, as manufacturers and dealers in oils, at the city of New York, and specially as manufacturers and vendors of said signal oil, and have manufactured and sold the same and

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Statement of the Case.

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thence, hitherto, used the said device or trade-mark as follows, to wit:



IX. That, on or about the same day, the defendants entered into a co-partnership under the firm name and style of F. O. Ketcham & Company, as dealers in oil, and thereupon gave out to the public and represented themselves as dealers in Capt. S. Pepper's "Extra Signal Oil," and held themselves forth as manufacturers and vendors of said oil.

X. That at and after the time of the death of said Captain Simeon Pepper, no person had any knowledge of the ingredients composing said signal oil, or the mode of compounding them, or the means by which the complete article was produced, except the said George N. Weston and the said Abbie A. Pepper, and they had not, nor had either of them, imparted said knowledge at any time previous to the commencement of this action.

XI. That said defendants have not, nor did they or either of them ever have knowledge of the several ingredients, proportions, and processes necessary to be known to manufacture the genuine article, heretofore and now known as "Capt. S. Pepper's Extra Signal Oil."

XII. That since the said February 20, 1874, to the time of the trial, the defendants have been manufac-

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Statement of the Case.

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turing and vending an oil which they have falsely called, by the name "Capt. S. Pepper's Extra Signal Oil," and have falsely represented such oil, to dealers therein and buyers thereof and the public, as the genuine manufacture heretofore known by and sold under the said name and device or trade-mark, and that they have sold the same under and with the label in manner following to wit :



XIII. That such wrongful actings and doings on the part of the defendants caused loss and damage to the plaintiffs.

And I do find as my conclusions of law :

I. That the defendant Ketcham, has not and never has had any exclusive right to the use of said trade-mark, and that the defendants have no right or title in or to the said trade-mark, or device, or to the use thereof or to the name of said Simeon Pepper, or to any part thereof.

II. That the plaintiffs are entitled to the exclusive use of the device and trade-mark as now and heretofore used by them in and about their business of man-

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Statement of the case.

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manufacturing and selling the oil, commonly heretofore and now known and called "Capt. S. Pepper's Extra Signal Oil," or "Pepper's Signal Oil," and the exclusive use of the name "Captain S. Pepper," on any manufacture of oil, and to all parts of said name.

III. That the plaintiffs are entitled to judgment enjoining and restraining the defendants and each of them as prayed for in the complaint, and in accordance with these findings and conclusions.

IV. That the defendants shall upon oath, deliver up, under the direction of a referee, to be appointed by the court, all labels, devices and marks and materials, for making or printing such labels and devices, now in the possession or under the control of the defendants, bearing the name of Capt. S. Pepper, or any part of said name, as designating any manufacture or pretended manufacture of oil or other illuminating substance.

V. That the plaintiffs by reason of the wrongful acts of the defendants have sustained damages which should be ascertained by a referee to be appointed by the court, to the end that upon the coming in of his report, final judgment shall be entered in this action for the relief hereby adjudged to the plaintiffs, as well as for such damages, if any, reported by said referee, together with the costs of this action, and costs of any reference pursuant to these findings and conclusions.

VI. That the plaintiffs are entitled to, and I do order judgment accordingly, dated June 16, 1874.

The following opinion was delivered at special term :

SPIER, J.—The action is brought against the defendants for violating the plaintiffs' trade-mark, consisting of a circular label or stamp, marked and letters "Captain S. Pepper's Extra Signal Oil." An arrangement had been made by which the parties, plaintiffs and defendants, had jointly as copartners, manufac-

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Appellants' points.

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tured this oil and the factory was known and published, "F. O. Ketcham & Co., Manufacturers." The defendants claimed not only to have knowledge of the secret process of making the oil, but also that they, in their arrangement with the plaintiffs and the original inventors for carrying on the business, had made a contract by which they had the right to use the trade-mark, and were in fact owners of it and the secret.

After the dissolution the defendants continued to make what they called "Captain Pepper's Extra Signal Oil," and to use the trade-mark.

The plaintiffs brought their suit to restrain defendants, by injunction, claiming that they were the proprietors of the trade-mark, and were alone possessed of the secret process of manufacturing the oil, and alleging that the defendants were making a spurious article and selling it in the market for the genuine oil.

The co-partnership arrangement made by the parties, was for the purpose of carrying on the business of making and selling this oil.

The compounding the ingredients was by arrangement exclusively intrusted to the plaintiffs as their special business in the copartnership, while the selling of the oil, and other labor necessary to create a market, and the taking all necessary steps in preparing it as merchandise merely, was the defendants' department.

I have no difficulty in finding that the issues in the pleadings have been clearly made out by the evidence in favor of the plaintiffs, and that they are entitled to the judgment asked for in the complaint.

*Frank Warner Angel*, attorney, and of counsel for appellants, among other things urged ;—*I. Weston* took the trade-mark as trustee of the firm (*Mitchell v. Read*, 61 *Barb.* 310 ; *Colly. on Part.* § 179 ; *Smith Merc. L.* 54 ; *Featherstonhaugh v. Fenwich*, 17 *Vt.*

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 Respondents' points.
 

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298; *Pawcett v. Whitehouse*, 1 *Russ. & Myl.* 132; *Russel v. Austwich*, 1 *Linn.* 52; *Colly. on Part.* § 182; 1 *Sto. Eq. Jur.* §§ 468, 623; *Kelly v. Greenleaf*, 3 *Story*, 93; *Keech v. Sanford*, 1 *Lead. Cas. Eq.* 92).

II. The doctrine of *Vigilantibus et non dormientibus equitas subvenit*, does not apply. It only applies where a party being apprised of the act about to be done, slumbers on his rights; for the betrayal of confidence reposed, the skillful lulling to rest of the intended victim, the adroit closing of every avenue through which apprehension might enter, whether this be done by words or by "expressive silence" are the ear-marks of successful fraud the world over; and a court of equity, should it make such a perverse application of one of its fundamental maxims, would become the efficient ally of the vigilant wrongdoer, prove recreant to its past history and the principles on which its very jurisdiction rests.

III. Having shown that this agreement with Mrs. Pepper was taken by Weston, as trustee of the firm, the next question is, what becomes of the trade-mark on the dissolution of the firm? On dissolution of a partnership, each of the partners has the right, in the absence of a stipulation to the contrary, to use the trade-mark (*Banks v. Gibson*, 34 *Beav.* 566; *Smith v. Everett*, 29 *Id.* 446; *Johnson v. Hillsley*, 2 *D. J. & S.* 446; *Comstock v. Moore*, 18 *How. Pr.* 421).

*A. J. Perry*, attorney and of counsel for respondent, urged;—I. The exclusive right to the use of the trade-mark described in the complaint is shown by the evidence of the plaintiffs. *Vide* opinion of the court; finding of fact; conclusions of law.

II. Ketcham recognized and acquiesced in the knowledge of the secret and proprietary interest of Weston and Mrs. Pepper to the trade-mark.

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Opinion of the Court, by CURTIS, J.

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BY THE COURT. — CURTIS, J. — To sustain this action, the plaintiff must establish an exclusive right to use the alleged trade-mark in question. The plaintiffs claim that through one of them, George N. Weston, they possess such exclusive right.

The plaintiff Weston, testified at the trial, that about September 1, 1870, he made an arrangement with Mrs. Pepper that she was to have ten per cent. of the gross profits of the manufacture of this oil, by the firm, consisting of the defendant, Ketcham, and himself, for the use of her husband's name; that he was to make it, and the firm have the benefit of it. Subsequently about January 1, 1872, and after the plaintiff Fiske became a member of the firm, and the firm having paid the ten per cent. to Mrs. Pepper, a new agreement was made between the plaintiff Weston and Mrs. Pepper, by which Mrs. Pepper allowed the plaintiff Weston, or any firm of which he may be, or become a member, as he may desire, the exclusive use of the trade-mark, on paying to her for five years one hundred and fifty dollars per annum, and on punctual payment at the end of five years, she covenanted to render and yield up the trade-mark for his own use forever.

The evidence of the plaintiff Fiske in respect to this new agreement, was as follows:

"Q. What conversation was had between yourself, Ketcham and Weston, in regard to the agreement which should be made for the firm's benefit, with Mrs. Pepper?

"A. We were anxious to have an agreement made, and wanted the best one possible.

"Q. What instructions, if any, did you give to Mr. Weston before he went to Mrs. Pepper for this purpose?

"A. To make the best arrangement possible.

"Q. For the firm's benefit?



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Opinion of the Court, by CURTIS, J.

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"A. Yes, sir.

"Q. Did he comply with your instructions?

"A. He did."

The plaintiff Weston testified, "It was talked over between us beforehand, that I was to make the best arrangement with Mrs Pepper that I could."

"Q. He instructed you to do it?

"A. Yes, sir.

"Q. Who instructed you?

"A. F. O. Ketcham.

"Q. After it was done, did he know what was done?

"A. He did."

On his cross-examination he further testified, as follows:

"Q. You went to her while a member of the firm of F. O. Ketcham & Co., under the instruction from your partner to do the best you could?

"A. Yes, sir."

The defendant Ketcham testified:

"Q. Why was the change made from ten per cent. to the sum of one hundred and fifty dollars a year? What conversation, if any, did you have with your co-partners before this agreement of one hundred and fifty dollars was entered into?

"A. Mr. Fiske suggested that we should have a different arrangement with Mrs. Pepper, and we talked the matter over between us, and came to a definite sum. Then Mrs. Pepper called on us several times at our office; had conversation with Mr. Fiske, Mr. Weston and myself, relative to the matter,—and came to a conclusion what she would do. She then left us and went home. We then talked the matter over between us, and agreed between us to give her so much money for her right, title and interest in the mark. Mrs. Pepper and me talked the matter over, and we had sev-

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Opinion of the Court, by CURTIS, J.

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eral conversations about it. I don't remember all the conversations.

"Q. You had several conversations with her ?

"A. Yes, sir.

"Q. Where ?

"A. At the store.

"Q. About what time ? before the agreement was made ?

"A. This conversation was held, I think, in the month of December, 1871.

"Q. Several conversations with her ? What were those about ?

"A. About this name — this trade-mark — this name.

"Q. What did you want to know about it ?

"A. We wanted to change it from the ten per cent. and give her a certain sum of money, for so many years.

"Q. Was that the whole of it ?

"A. Yes, sir.

"Q. You wanted to give a certain sum of money, for so many years, at the expiration of which the trade-mark should belong to you ?

"A. No, sir ; to the firm.

"Q. You wanted to buy it for the firm ?

"A. Yes, sir.

"Q. That was your object in having these conversations with Mrs. Pepper ?

"A. Yes, sir."

The question arises whether upon this evidence which is undisputed, the agreement of January 1, 1872, made between the plaintiff Weston and Mrs. Pepper, operated as a matter of law to vest the right to use this trade-mark in the firm, or in Weston individually. It will be observed that the consideration for it was paid by the firm out of the moneys of the firm.

If we look at the analogies of the law, as, for example, at the renewal of a lease by a partner in his own name which had been originally granted to the co-partnership, some light may be thrown upon the effect of the transaction, for this agreement with Mrs. Pepper for the use of the trade-mark for five years, and then conditionally to vest, is in the nature of a lease and the same controlling principles apply to it.

In *Mitchell v. Read* (61 *Barb.* 310), it was held, that where, before the expiration of a co-partnership, one partner, without the consent of his co-partner, obtained a new lease of the place of business of the firm in his own name, to commence before the partnership ends, such lease vested in the lessee as trustee for the firm. In *Burrill v. Bull* (3 *San. Ch.* 15), SANFORD, V. C., thus speaks of an analogous occurrence :

“It was a transaction by which one of three joint owners of a lease, deputed by his associates to obtain its renewal for the common benefit, and availing himself of his part ownership and his connection with the property to obtain such renewal, procured it in his own name, and attempted to shut out his associates from sharing in its advantages. It is, in short, an unmitigated fraud, against which courts of equity have ample jurisdiction to grant relief.”

Courts of equity have inexorably frowned upon the attempts of one partner to secure any individual advantage in transactions entrusted to him, affecting the rights or property of the co-partnership. He is held to the highest accountability as an agent, and the agency is one that in every commercial community invokes the highest confidence and responsibility, and should be protected by every safeguard.

In the case under consideration, the plaintiff Weston went, at the request of his co-partners, to make a new arrangement as to what should be paid for the future use of the trade-mark, the right to use which

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Opinion of the Court, by CURTIS, J.

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the firm already possessed on payment of ten per cent. of the gross profits. It is undisputed that the firm up to its dissolution, January 30, 1874, paid from its funds the annual sum to be paid, under the agreement which he took in his own name. If the law is to be applied to this transaction upon the facts as they appear, that is applied to similar transactions by a partner in respect to taking the extension of the firm's lease in his own name, it is quite certain that the plaintiff took nothing by the agreement, except as trustee for the firm.

But there are considerations urged by the plaintiff, which, it is claimed, should make this case an exception to the general rule. It is said, and so found by the referee, that this agreement, upon its execution, came to the knowledge of the other two partners, Fiske and Ketcham, and that they severally ratified the same.

Fiske, one of the partners, and now one of the plaintiffs, says he saw and read the paper soon after it was executed, and expressed his disapprobation, and then proceeds to testify :

"When the paper was drawn up I thought, being a member of the firm of F. O. Ketcham & Co., I should have an interest in that trade-mark as well as Weston, but Mrs. Pepper declined to give it to any one but Weston, and we acquiesced in that, to pay her one hundred and fifty dollars a year.

"Q. What else did you say in stating your disapprobation ?

"A. That is the substance of it.

"Q. Did you say anything to Mr. Ketcham in regard to your disapprobation of this contract ?

"A. I did.

"Q. Please state what that was ?

"A. General disapprobation.

"Q. Why did you disapprove of it ?

"A. I thought it was not fair."

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Opinion of the Court, by CURTIS, J.

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The plaintiff Weston testifies :

“Q. What remark if any did Mr. Ketcham make when you showed him that agreement ?

“A. I don’t remember whether he made any at the time I showed it.

“Q. Did he make any afterwards ?

“A. I have heard him make a great many since.

“Q. In regard to this agreement ?

“A. Yes, sir.

“Q. What was the substance of the remark ?

“A. He thought I ought to let him in and let him have an equal interest.”

On his cross-examination he testified :

“Q. Did you say anything to Messrs. Fiske and Ketcham as to your influence with Mrs. Pepper ?

“A. I probably have ; I don’t remember, though.

“Q. Did you state to them that you thought, owing to your influence, you could make the best bargain in this matter ?

“A. Probably I did ; I would not swear that I did.”

Albert Johnson, who occupied the same office with the firm, testifies in respect to this agreement :

“Q. Do you remember hearing it talked about by Mr. Ketcham and his co-partners Fiske and Weston ?

“A. I do.

“Q. State to the court what you recollect hearing him say on the subject of this agreement on Mr. Ketcham ?

“A. The only thing I remember, and I can not give the words for that, Mr. Ketcham did not like it, and was angry because the paper was made out in the name of George N. Weston and not in the name of the firm.

“Q. What did he say in reference to that ?

“A. I can not say what he said in regard to that. He did not like it.”

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Opinion of the Court, by CURTIS, J.

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The evidence is uncontradicted that the two other partners refused to approve or recognize this agreement made by Weston in his own name, as a proper discharge on his part of the duty confided to him by the firm.

It is to be presumed that the court in finding that they did ratify it, based that finding upon the fact that the firm continued to use the trade-mark and conduct the business of the manufacture of the oil the same as before, and did not resort to their legal remedy. This is more in the nature of acquiescence than ratification ; and again, such acquiescence was doubtless forced and not voluntary, for Weston alone knew the secret of making the oil, and if they had moved in the matter adversely to him, they would, in asserting their remedy, not have possessed the knowledge by the use of which the capital employed in the manufacture of the article, no part of which was contributed by Weston, might be made remunerative. It seems to be inequitable, under such circumstances, to decide that, because they refrained from attacking the transaction at once, they acquiesced in or ratified it, and, least of all, that there was a ratification of it in the sense of waiving any equitable rights that it gave the firm. This forced quiescence on the part of the other members of the firm can hardly be held sufficient to sustain the finding of the court, that there was a ratification of this agreement.

It is urged by the respondent, and the court so finds, that Ketcham never knew the mode of manufacturing this oil. This is advanced as a reason why he should be restrained from using the trade-mark. The answer to this is obvious. He may become possessed of such knowledge, and even if he sells a different article from what he by the trade-mark represents it to be, his responsibility is to those whom he deceives. His ignorance, or his selling another article, does not con-

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Concurring opinion of FREEDMAN, J.

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fer on the plaintiffs any rights to restrain him from interfering with what does not belong to them any more than to him exclusively.

The plaintiff Weston bargained for this right at the request of the firm, and for the use of the firm, and the funds of the firm paid for the use of it and for the acquisition. It is left by the articles of dissolution an equitable asset of the firm. The plaintiffs by their own showing are not in a position to ask equitable relief, and they fail to establish any exclusive right that entitles them to an injunction.

In this aspect of the case, it becomes unnecessary to consider the questions raised by the exceptions taken on the accounting for damages, or the other exceptions raised in the case.

The judgment appealed from should be reversed with costs to appellants to abide the event of the suit, and a new trial granted, and the order appealed from should be affirmed, with costs, as I concur also, in that respect, with the views expressed by Judge FREEDMAN.

FREEDMAN, J. (concurring). — I concur in the reversal of the judgment for the reasons stated by my brother CURTIS.

The defendants also appealed from an order denying their motion for a new trial. The motion was based on the case and exceptions, and it was addressed to a special term of this court, not held by the judge who had tried the case. The grounds of the motion were that the judgment is excessive and contrary to the law and the evidence of the case. Consequently, the object of the motion was to obtain a review on the merits, of the decision of the first judge on a trial of an issue of fact without a jury. Such a motion is not authorized by law. The mode of reviewing either errors in law or in fact, where the trial is by the court, is entirely distinct from that adopted where the trial

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Concurring opinion of FREEDMAN, J.

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is by jury ; and a review of a judge's decision, on a trial of an issue of fact, can only be had at general term on appeal from the judgment entered upon such decision (*Code*, § 348 ; *Malloy v. Wood*, 3 *Abb. Pr.* 369 ; *Watson v. Scriven*, 7 *How. Pr.* 9 ; *Burnett v. Phalon*, 4 *Bosw.* 622).

The only apparent exceptions, for there really are none, are :

I. If, under section 267 of the Code, upon motion by either party, to a general or special term, it shall be made to appear that the decision of a single judge is unreasonably delayed, the court may make an order absolute for a new trial, or may order a new trial, unless the decision shall be filed by a time to be specified in the order.

II. Where the decision filed under section 267 does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may move under section 268 for a new trial at *general* term.

The case before us does not fall within either of these exceptions, and the order appealed from should therefore, be affirmed with costs.

Judgment reversed and a new trial ordered, with costs to appellants to abide event.

Order affirmed, with costs.

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Statement of the Case.

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ABRAHAM VAN NOSTRAND, PLAINTIFF and  
APPELLANT, v. THE N. Y. GUARANTY AND  
INDEMNITY COMPANY, DEFENDANT AND  
RESPONDENT.

I. CONTRACT BY REFERENCE.

1. Where a written or printed contract *signed by a party contains* in its body a clause such as, "*subject to the conditions printed on the other side and which forms a part of this agreement,*" the conditions thus referred to become a *part of the contract*.

1. PRESUMPTION.

One must be presumed to *know the nature* of a contract he signs.

2. PROOF THAT THE CONDITIONS REFERRED TO FORMED PART OF THE CONTRACT, WHAT SUFFICIENT.

1. *Proof of the signature* of the party (in the absence of other evidence) is *sufficient* to establish that he entered into a contract of which the conditions referred to formed a part.

- a. *Evidence what insufficient to overcome such proof.*

1. Evidence which shows neither *compulsion, nor fraud, nor absence of opportunity for acquiring the fullest knowledge, nor even absence of notice or knowledge.*

II. NEGLIGENCE—GROSS.

1. PLEDGEE'S LIMITING LIABILITY TO GROSS NEGLIGENCE.

1. *What will not constitute gross negligence.* Where the pledgee leaves the goods in a warehouse selected by the pledgor (which was a suitable place), under the charge of warehousemen who had previously been co-partners with the pledgor, and who had sustained good reputations up to the time of their subsequent absconding, and employs an agent who periodically visits the warehouse, and examines the goods to see that they are properly stored and protected, and kept in proper condition, his last visit being about a week before the absconding,

HELD,

that the pledgee was not guilty of gross negligence, and therefore not liable for the value of the goods stolen or misappropriated by the absconding warehousemen.

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Statement of the Case.

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Before FREEDMAN, CURTIS, and SPEIR, JJ.

*Decided February 1, 1875.*

Appeal by the plaintiff from a judgment in favor of the defendants for seven thousand nine hundred and ninety-six dollars and forty cents.

On March 24, 1869, the plaintiff was the owner of eleven thousand six hundred and seventy-nine bushels of oats, then on storage in certain public stores belonging to Messrs. Scott & Company, located at the Atlantic Docks in the city of Brooklyn.

On that day the defendants loaned six thousand dollars to the plaintiff, payable in thirty days. On April 23, 1869, the loan was continued for thirty days further; and on May 22, 1869, the loan was further continued for thirty days. To secure the payment of this loan, the plaintiff pledged to, and "confided to the management, custody, and charge of," the defendants the eleven thousand six hundred and seventy-nine bushels of oats, endorsing and delivering to them the warehouse receipt he held for the oats, and at the same time agreeing to pay the defendants interest upon the amount of the loan at the rate of seven per cent. per annum, and the defendants' commissions and charges for their "management and charge" of the property, and "all disbursements made by the defendants on account of the said property" while in their custody.

The defendants, on their part, agreed to take the "management, custody, and charge" of the oats, for which they were to be paid three-quarters per cent. upon the amount of such advance, over and above all disbursements, and to return the property to the plaintiff on the payment of the loan, and the charges agreed by him to be paid.

On receiving an extension of the loan on April 23, 1869, the plaintiff paid the defendants "forty-five

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Statement of the Case.

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dollars for taking care of the property" for the thirty days previous, and again on May 22, 1869, on obtaining the second extension, made a similar payment to the defendants for their care of the property up to that time.

When the loan expired, June 21, 1869, a tender of the amount and interest was made to the defendants, and a demand made of the oats. No objection was made to the tender. The oats were not delivered in consequence of the occurrences hereafter stated.

When the contract was first made, and on the occasion of each extension, and at various intermediate times, the clerk of the defendants, who had charge of such matters, went to the warehouse of Scott & Co., at the Atlantic Docks, and examined the grain and saw that it was not heated, but that it was in good condition, and was properly stored and protected from the weather. His last inspection of the grain was May 24, two days after the company had given to Van Nostrand the last extension. About a week after this Scott & Co. shut up their storehouse and absconded, and when, on the day after their disappearance, their store was examined, it was found to be empty. Both the plaintiff's and the defendants' witnesses testified that, up to the time they ran away, Scott & Co. were conducting business as usual, and were in fair repute and well spoken of in a business way. It was proved that, with the facilities they had at their warehouse, Scott & Co. could easily have removed the whole quantity of oats in a single night. The defendants' clerk who had charge of the matter, saw them at their office in Wall Street on the afternoon before they absconded, and the next day, on hearing that they had gone, went at once to their warehouse. It was about May 28, or 29, when, as the plaintiff says, he heard that Scott & Co. had gone away. When the plaintiff procured the loan he made a contract in writing with the defendants,

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Appellant's points.

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by which he agreed to repay the amount loaned with interest, and pledged the oats (eleven thousand six hundred and seventy-nine bushels) to secure the same. This contract was made subject to the following condition indorsed upon it:

"The New York Guaranty & Indemnity Company shall not be liable for any loss or injury resulting from depreciation, or from any other cause than the gross negligence of the company or its agents, which may happen to the property mentioned in the instrument on the other side, whilst in its custody."

The plaintiff claimed three thousand dollars damages. The defendants set up as a counter claim the amount of its unpaid loan to the plaintiff. For this amount the court directed a verdict in the defendants' favor.

From the judgment entered thereon plaintiff appeals.

*Hutchins & Clinch*, attorneys, and *Edward S. Clinch*; of counsel, for appellant, urged;—I. As ordinary bailees for hire, defendants were bound to use the care required of pledgees, but having received extra compensation for "their management, custody, and charge" of the property, they were bound to use extraordinary care and diligence (*Arent v. Squire*, 1 *Daly*, 347).

II. The theft of goods, while in the possession of a pledgee or bailee, is presumptive evidence of negligence (*Jones on Bailment*, 44; *Pothier on Oblig.* 620; *Chicopee Bank v. Philadelphia Bank*, 8 *Wall*, N. S. 641; *Schwerin v. McKie*, 5 *Robt.* 404; *Arent v. Squire*, 1 *Daly*, 347).

III. The facts in the case constitute no answer to the charge of the negligence; the bailee is bound to take better care of the goods than the bailor had taken, if the bailor were not a prudent man (*Jones on Bailm.*

## Appellant's points.

82, 83; 2 *Kent's Com.* 580; *Doorman v. Jenkins*, 2 *Adolph & Ellis*, 256).

IV. The defendants can not escape liability except for gross negligence, under the first condition printed on the back of the contract between them and the plaintiff, unless they first bring home to the plaintiff knowledge of the terms of the condition, and then show his assent thereto. This they did not attempt to do. (*Blossom v. Dodd*, 43 *N. Y.* 464; *Dorr v. N. J. Steam Navigation Co.*, 43 *N. Y.* 264; *Dana v. Munroe*, 38 *Barb.* 528.)

V. The burden of proof is on the defendants, especially in those cases where there has been a total default in the delivery, and where the action is on contract. The defendants, to succeed, should have then shown they had not been guilty of negligence (*Cairnes v. Robbins*, 8 *Mees & Wels*, 258; *McKenzie v. Cox*, 9 *Carr & Payne*, 632; *Platt v. Hibbard*, 7 *Cow.* 497; *Arent v. Squire*, 1 *Daly*, 347; *Schwerin v. McKie*, 5 *Rob.* 404; *Day v. Riddle*, 16 *Ver.* 48; *Phillips on Ev. Cairnes' & Hill's Notes*, p. 633).

VI. Irrespective of any questions heretofore suggested, as the case stood when the defendants closed, it was for the jury to say whether the defendants had been guilty of any negligence in the care of the property. Whether a party has been guilty of negligence is alway a question to be determined by the jury (*Story on Bailm.* 15; *Doorman v. Jenkins*, 2 *Adolph & Ellis*, 256; *Vaughan v. Menlove*, 3 *Bing.*, *N. C.* 468, 475; *Brown v. N. Y. C. R. R. Co.*, 31 *Barb.* 385; *Moore v. Westervelt*, 21 *N. Y.* 103; *Welling v. Judge*, 40 *Barb.* 193; *Oldfield v. N. Y. & Harlem R. R. Co.*, 14 *N. Y.* 310, 312; *Hegan v. Eighth Ave. R. R. Co.*, 15 *N. Y.* 380; *Van Horn v. Kermit*, 4 *E. D. Smith*, 457; *Bush v. Miller*, 13 *Barb.* 489; *Wells v. Steam Nav. Co.*, 8 *N. Y.* 375).

VII. A judge may direct a verdict only in such

## Respondent's points.

cases where a verdict by the jury against the opposite party would be set aside as against the weight of evidence. If the jury, in this cause, had found that the omission of the defendants to look after nearly twelve thousand bushels of oats in the month of May, for over a week, when stored in a public warehouse, with no evidence of the employment of a watchman, and with the liability of oats in that season of the year to become heated and rotten, was negligence, such as a prudent man would not be guilty of, the appellate court would not disturb the verdict (*Schanck v. Morris*, 2 *Sweeney*, 464; *Fish v. Davis*, 62 *Barb.* 122; *St. John v. Mayor*, 6 *Duer.* 315; *Ross v. The Mayor*, 4 *Rob.* 49).

*Barney, Butler & Parsons*, attorneys, and *Thomas H. Hubbard*, of counsel, for respondent, urged;—I. The defendant was pledgee of the grain. As such, it was, by the rules of the common law, liable only for the exercise of ordinary care in respect to the property pledged (*Story on Bailm.* § 332; *Hyland v. Paul*, 33 *Barb.* 241). This being the case, the defendant, as pledgee, can not be held liable for loss by the theft or fraud of *Scott & Co.*, against which the exercise of all its care was no protection (*Story on Bailm.* §§ 39, 334, 335, 338; 2 *Kent's Com.* \*580, \*581; *Redf. on Car.* § 661).

II. But beyond the protection afforded it by the rules of the common law, the defendant had by special contract limited its liability to losses which should arise from the gross negligence of itself or its agents. This limitation it had the right to make (*Wells v. Steam Nav. Co.*, 2 *N. Y.* 204; *Dorr v. N. G. Steam Nav. Co.*, 11 *N. Y.* 485, p. 491; *Smith v. N. Y. Cent. R. R. Co.*, 24 *N. Y.* 222, p. 223).

III. There was no disputed question of fact in the case. There being no disputed question of fact, it was

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Opinion of the Court, by CURTIS, J.

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proper for the court to direct a verdict (*Wharton on Neg.*, § 420, and cases there cited).

BY THE COURT.—CURTIS, J.—The plaintiff and defendants entered into a contract by which the liability of the latter for the oats pledged, is limited to such losses only as shall arise from their own negligence or that of their agents. The parties had a right to enter into such a contract, and having done so are bound by it, unless some lawful reason exists by which the plaintiff is released from this provision of it.

It was claimed on the argument, that the plaintiff had no knowledge of the terms of this condition printed on the back of the contract, and never saw it, or assented to it, and that the defendants failed by any evidence to bring this knowledge home to the plaintiff.

The evidence that the plaintiff signed a contract containing such a condition, and referred to in the body of it as "being printed on the other side," is, in the absence of other proof, enough to establish his liability under it. The plaintiff must be presumed to know the nature of the contract he signed, when he received the check for six thousand dollars from the defendants. His testimony "that the company produced the paper and caused me to sign it, and I then delivered it to them," is perhaps not intended as a lucid statement of a common business transaction, but it fails to show any compulsion or any absence of notice or knowledge of its contents, or absence of opportunity for acquiring the fullest knowledge. To sustain the views urged in this respect on the part of the plaintiff, would be to endorse a doctrine that would prejudice the enforcement of all ordinary contracts.

The question only remains for consideration, whether there has been any gross negligence in respect to the property pledged by the defendants. The place

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Opinion of the Court, by CURTIS, J.

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where it was deposited was suitable. It had been selected by the plaintiff himself, and it was in charge of persons who had been previously co-partners in business with the plaintiff, and who had sustained, up to the time of their absconding, good reputations. The defendants also had other grain in the same stores, and also had an agent who visited, with reasonable diligence, the property in question, and saw that it was protected from the weather, and from heating, and deterioration from other causes.

What more could be reasonably expected from persons who give the most careful attention to property, even of their own.

The defendants exercised that full measure of care which the civil law designates as that "*quae diligens pater-familias in suis rebus praeſtare ſolet.*"

Gross negligence has been defined as "that omission of care, which even the most inattentive and thoughtless men never fail to take of their own concerns." No such omission as this, has been shown in the slightest degree, on the part of the defendants or their agents. It must be held, that the plaintiff failed to prove any gross negligence in regard to the property pledged, and this, by the condition of the contract, disposes of the appeal.

It is unnecessary for the purpose of deciding this case, to inquire as to whether there was any negligence at all on the part of the defendants. But the impression is very strong that there was none, and that the ancient and just principle should apply, "*Si creditor ſine vitio ſuo argentum pignori datum perdiderit, reſtituere id non cogitur.*"

The judgment appealed from should be affirmed, with costs to the respondent.

FREEDMAN and SPEIR, JJ., concurred.



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Statement of the Case.

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CHARLES W. WATSON, PLAINTIFF AND RESPONDENT, v. MATTHEW T. BRENNAN, SHERIFF, &c., DEFENDANT AND APPELLANT.

## I.—SHERIFF'S LAW.

## 1. FALSE RETURN.

1. *Duty of sheriff in respect of executions.*

He is bound to use all *reasonable endeavors* to execute the process of the law in the most *effectual manner*.

2. *Custody of the law.*

The fact that property is in the custody of the law does not *absolve* the sheriff from *above duty*.

a. He is nevertheless *bound to use* such reasonable care and diligence as will, if the goods or any part thereof are under the fact and the law subject to the execution held by him at the time of its issue, or if they or their proceeds or any part thereof subsequently during the life of the execution become subject thereto, *enable him or the plaintiff* in the execution so to subject the same.

1. *Omitting to use such care and diligence.*

a. If the plaintiff thereby *loses the benefit of his execution*, the sheriff will be *liable* in an action for a *false return*.

## 2. DEFENSE TO ACTION FOR FALSE RETURN.

1. *Bankruptcy proceedings. Attacking judgment.*

a. It does *not lie with the sheriff* to urge that the plaintiff's judgment is invalid under the bankrupt act, and *that therefore no act done under or by color of it could inure to plaintiff's benefit*.

## II.—APPLICATION OF ABOVE PRINCIPLES.

Thus where the defendant, being an incumbent sheriff, held three executions against the same judgment debtor (the plaintiff's being the junior of the three), and the preceding sheriff under a previous attachment against the same judgment debtor, had attached and held in custody goods of sufficient value to satisfy the attachment and all the executions, and refused to allow his successor to seize and levy on them under his executions, but allowed a

## Statement of the Case.

portion to be removed from his custody in a concealed and surreptitious manner, by persons other than his successor, of which the deputy holding the executions had notice. And afterwards bankruptcy proceedings were commenced against the judgment-debtor in which the attachment was declared void under the bankrupt act, and an order made on notice to the incumbent sheriff, authorizing him to sell the property which had not been removed, and directing him to hold the proceeds, under which order he did sell and afterwards applied the proceeds on the two executions prior to the plaintiff's, leaving a balance unpaid on one of them, the money so applied, however, as well as the proceeds of the goods removed (which were sold under an order in the bankruptcy proceedings) were subsequently, under an order in those proceedings, paid over to the assignee in bankruptcy, and the plaintiff's execution was thereafter returned *nulla bond*;

## HELD,

1. *That the deputy holding the plaintiff's execution owed to him the duty*

of seeking from the watchman who gave the information of the removal, what information and knowledge he had about it, of making inquiries for persons or carts likely to remove the goods, of asking to look at the warrant of attachment, of applying to the former sheriff himself in relation to the removal, of calling on him to release from the levy of the attachment all goods beyond what was necessary to satisfy the attachment and sheriff's fees, of notifying the plaintiff of the excessive levy under the attachment, and of the removal, and of either making a claim under the plaintiff's execution in the bankruptcy proceedings, or notifying the plaintiff so that he could either indemnify the sheriff or make a claim himself.

2. *That the deputy not having performed these duties* the plaintiff had lost the benefit of his execution by reason of such negligent omission.

3. *That the negligence was of such character as to entitle the plaintiff*

to recover, in an action for a false return, the amount of his execution and interest thereon.

4. *That the proceedings in bankruptcy did not relieve* the sheriff from the liability raised by such negligence.

5. *Attacking the judgment.*

It does not lie with the sheriff to raise the objection that plaintiff's judgment was invalid under the bankrupt law, and urge

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that therefore neither the property nor its proceeds could be realized under it.

Before MONELL, Ch. J., and CURTIS, J.

*Decided February 1, 1875.*

The appeal is by the defendant from a judgment at special term. The trial was without a jury, the parties having waived a jury.

The action was brought to recover damages against the defendant for a false return of "no property" upon an execution.

The defenses were a general denial, prior executions in favor of another party against the same defendants, and executed upon all the property of the defendants, and further that plaintiff's execution, and the judgment upon which it was founded, were obtained and issued to procure a preference in violation of the bankrupt law of the United States, and therefore void.

The findings of the court were as follows:

*First.*—That at the time of issuing the execution hereinafter mentioned, the defendant was the sheriff of the county of New York in the State of New York.

*Second.*—That on January 31, 1871, in an action in the marine court of the city of New York, wherein this plaintiff was plaintiff, and Edward P. Sanger and Walter Scott were defendants, the plaintiff recovered a judgment duly given by said court against the said Edward P. Sanger and Walter Scott for the sum of four hundred and nine dollars and thirty-three cents damages and costs, which judgment was thereafter, to wit, on February 1, 1871, duly docketed in the office of the clerk of the city and county of New York.

That thereafter and on said February 1, 1871, an execution against the property of the said Edward P. Sanger and Walter Scott was duly issued by the plain-

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Statement of the Case.

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tiff upon said judgment, and directed and then delivered to the defendant, as sheriff of the city and county of New York, for service.

*Third.*—That said execution was directed to and delivered, to this defendant, as sheriff of the said city and county of New York, for service, whereby, after containing the statement and recital of the matters required to be stated and set forth in such case, pursuant to section 289 of the Code of Procedure, and after setting forth that the whole of the judgment upon which said execution was issued, was then actually due, this defendant was, in substance, commanded to satisfy the said judgment out of the personal property of the said judgment debtors within this defendant's county, or if sufficient personal property could not be found, then out of the real property in his county belonging to such judgment debtors on the day when the judgment was so docketed in his county, or at any time thereafter in whose hands soever the same might be, and to return the said execution within sixty days after the receipt by him, as required by law.

*Fourth.*—At the time of the delivery of such execution to the defendant, there was within said county personal property belonging to the said Edward P. Sanger and Walter Scott, out of which the said sheriff might have satisfied the said execution, of which property he then and there had notice.

*Fifth.*—That notwithstanding the premises, and in violation of his duty as sheriff, he did not satisfy said judgment or any part thereof, but on November 28, 1871, falsely returned upon said execution to the clerk of the court of common pleas for the city and county of New York, that said Edward P. Sanger and Walter Scott had not any goods or chattels within said county whereby he could cause to be levied the amount of said judgment and execution or any part thereof.

*Sixth.*—That by the said negligent and wrongful

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Statement of the Case.

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conduct of the defendant, the plaintiff sustained damages in the amount of said execution, to wit, four hundred and nine dollars and sixty-three cents and interest. That the amount of such interest to March 11, 1874, is the sum of eighty-nine dollars and fourteen cents.

*Seventh.*—That the said judgment upon which said execution was issued, was obtained by the plaintiff in a hostile suit in which the said judgment debtors denied their liability, and contested the plaintiff's claim upon the merits.

*Eighth.*—That the said judgment debtors did not procure, or suffer, nor intend to procure or suffer their property to be taken under said execution with intent to give a preference to the plaintiff, nor with intent to defeat or delay the operation of the bankrupt-act.

And as conclusions of law from the foregoing facts, the court found that the plaintiff was entitled to judgment against the defendant for the sum of four hundred and ninety-nine dollars and seven cents.

At the defendant's request the court found the following additional findings :

That the defendant's term of office as sheriff commenced on January 1, 1871, and that his immediate predecessor in office was James O'Brien.

That on January 12, 1871, the defendant received executions, issued in due form of law, upon two judgments of the supreme court, in favor of the Tenth National Bank, against the said Edward P. Sanger and Walter Scott, for the sum of four thousand and eighty-three dollars and forty-seven cents, and five thousand and fifty-one dollars and one cent, respectively, and in due form of law, commanding the defendant to satisfy said judgments out of any property of the said Sanger & Scott in the city and county of New York.

That the defendant gave the said O'Brien notice

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Statement of the Case.

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that he held executions against said debtors, and levied upon all of the said property, subject to the rights of said O'Brien ; and at the request of the plaintiffs in said action, the defendant on January 15, 1871, placed a man outside of said place of business, for the purpose of taking possession of said property in case the said O'Brien should for any reason release it.

That on February 24, 1871, a petition in bankruptcy was duly filed in the United States district court for the southern district of New York, against said Edward P. Sanger and Walter Scott, by certain of their creditors, under and pursuant to which petition and the proceedings thereunder the said Sanger & Scott were adjudicated bankrupt, and Richard Warren and Edward Rowe were chosen assignees of the estate of said bankrupts, and an assignment of said estate duly executed to said assignees on April 11, 1871, and on the day said petition was filed as aforesaid, the said United States district court issued its injunction restraining the defendant and said O'Brien and all other persons from disposing of or interfering with the property of said debtors, Sanger and Scott, which said injunction was served upon this defendant on the said February 24, 1871.

That on or about March 8, 1871, the petitioning creditors filed their further petition addressed to the said United States district court, praying that said goods at No. 470 Broome street be sold at public auction as perishable, and the proceeds held subject to the order of that court ; that said petition, with notice thereof, was served upon the defendant and upon James O'Brien, late sheriff as aforesaid ; that said O'Brien and this defendant appeared and opposed said motion, but the said court, nevertheless, made its order modifying its injunction so as to allow this defendant to sell said property through Wilmerding, Hogue & Co., auctioneers, and hold the proceeds, after paying

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the expenses of sale, subject to the said injunction; and the said Wilmerding, Hoguet & Co. did sell said property, and paid to this defendant the sum of eight thousand two hundred and forty-nine dollars and twenty-five cents; that he applied five thousand and fifty-one dollars and one cent thereof in satisfaction of one of said Tenth National Bank executions, and three thousand one hundred and eighty-eight dollars and twenty-four cents, applied upon the other, and made a return of "no goods," as to the balance of said execution.

At the plaintiff's request the court found the following additional findings:

That on January 12, 1871, two executions against the said Sanger and Scott were issued to the defendant, upon judgments in favor of the Tenth National Bank, for four thousand eight hundred and three dollars and fifty-seven cents, and five thousand and fifty-one dollars and one cent, which executions were in the hands of the defendant at the time of the issuing of the plaintiff's execution.

That on January 14, the deputy of the old sheriff, upon said attachment, removed from the said stock of goods more than sufficient to satisfy such attachment, with his costs and expenses, of which fact the defendant had notice; and, nevertheless, continued in possession of the stock at the judgment debtors' store, and forbade the defendant's deputy to take any of the goods under his execution, and the defendant did not take possession of the same, although he had notice that the goods had been removed under the attachment.

The justice found as above requested, omitting, "of which fact the defendant had notice."

That under an order of the United States district court the said goods were sold by the sheriff, and realized upon such sale \$8,249.25, of which sufficient to satisfy the execution for five thousand and fifty-one dollars

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and one cent in favor of the Tenth National Bank was applied thereon, and the same was returned satisfied, and the remaining three thousand one hundred and eighty-five dollars and twenty-four cents was applied upon the other execution for four thousand eight hundred and three dollars and forty-seven cents in favor of said bank, and the same was returned satisfied as to the three thousand one hundred and eighty-five dollars and twenty-four cents, and no real or personal property as to the remainder, and the defendant received his fees upon such execution.

That the attachment for three thousand dollars in favor of Algeo having been levied less than four months prior to the filing of the petition in bankruptcy, the same was dissolved by the adjudication thereon, and the goods removed from the store on January 14, by the deputy of the former sheriff, were surrendered to the marshal under the bankruptcy proceedings, and afterwards sold by William Topping & Co. in the bankruptcy proceedings, under an order of the United States court, and realized five thousand and forty-nine dollars and sixty-four cents over and above all expenses of sale.

That the defendant took no action and made no levy under the plaintiff's execution upon said goods, though he had notice that said goods were in his county, and gave no notice to him of any of the proceedings taken by or against said defendant in the bankruptcy court in respect to the goods of the judgment debtors, Edward P. Sanger and Walter Scott, and set up no claim or lien in the proceedings in the bankruptcy court under the plaintiff's execution.

That the judgment debtors did not procure or suffer, or intend to procure or suffer their property to be taken on the execution of the plaintiff with the intent to give the plaintiff a preference in violation of the bankrupt act.



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Statement of the Case.

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There were exceptions by the defendant to each and all of the findings of the court.

At special term the following opinion was delivered :

SEDGWICK, J.—The defendant became sheriff in 1871. Some time before January 1, 1871, James O'Brien, the late sheriff, through McKnight, one of his deputies, seized a stock of goods belonging to Sanger & Co., in their store in Broome-street, under an attachment against them, and remained in possession down to February 24, 1871. The attachment was in the sum of three thousand dollars.

On January 12, 1871, two executions were issued to the defendant. These were in the aggregate for nine thousand eight hundred and fifty-four dollars and forty-eight cents. On that day the defendant's deputy, one Schmitz, went to the store in Broome-street for the purpose of levying under these executions. He was informed by or in behalf of McKnight that the latter had possession of all the goods by virtue of the attachment. The defendant's deputy, Schmitz, did not take or attempt to take any possession or control of any goods, but made what he called an informal levy upon the surplus, if any, that might be left after satisfaction of the attachment. He asked McKnight to allow him to take possession, but McKnight refused.

On January 15, 1871, defendant's deputy, Schmitz, put a new man, named Pearsall, on guard over the store, but not in it, for the purpose of taking actual possession if the late sheriff's deputy, McKnight, should abandon his levy under the attachment.

On January 14, 1871, McKnight removed goods from the store of the value of five thousand and forty-nine dollars and sixty-four cents. The defendant's deputy, Schmitz, was informed by his man Pearsall that McKnight had taken goods. He was not informed of the value of these goods, or of the place to which

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Statement of the Case.

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they had been taken. He received this information before February 24, 1871. They had been taken to a place for storage in this county. On February 1, 1871, the plaintiff duly took out an execution against the property of E. P. Sanger & Co., for the sum of four hundred and nine dollars and thirty-three cents. This was placed, to be levied, in the hands of defendant's deputy, Schmitz, on the same day.

Nothing occurred before February 23, 1871, to prevent the deputy, Schmitz, from doing his whole duty to the plaintiff under his execution. He was bound to use reasonable and ordinary efforts to find property on which he might levy, that would as far as possible pay the three executions referred to. Until February 1, 1871, when plaintiff's execution was placed in his hands, the plaintiff in the prior executions could alone call him to account, but on February 1, and from that to at least February 23, the plaintiff here had a right to his diligence in endeavoring to levy sufficient under the executions in his hands, to secure the three. He knew of the goods in Broome-street. They were at least of the value of eight thousand three hundred and thirty-nine dollars and twenty-five cents. He had heard that McKnight had taken under the attachment in his hands goods from the store. This case, I think, turns upon the conduct in respect of these goods. If he used ordinary diligence and reasonable effort to discover where they had gone, the defendant is not responsible for any consequence that came from his not having known concerning them. If the performance of his duty would have made known to him where the goods were or what they were, and if then a use of ordinary means would have enabled him to make a levy that would have secured the plaintiff's execution, the defendant is liable to respond to the plaintiff for the levy not having been made.

If the goods, both in Broome-street and on storage,

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Statement of the Case.

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were held regularly and in compliance with law under the attachment, the defendant's deputy had no power to seize or take possession of them, or any part of them. The deputy holding the attachment had a right to execute the process, so as to take or keep possession of enough goods to secure the payment of three thousand dollars. No question was made as to the amount of fees under this attachment. No demand seems to have been made for them out of the property when it went into the bankruptcy court.

What did defendant's deputy, Schmitz, do to discover the property that had been taken away from the store? He first asked deputy McKnight's assistant where the goods had been taken to. This assistant told him to ask McKnight. McKnight was asked, but refused to tell him. He also asked one of the firm of Sanger & Co., who professed to know not, and also the present plaintiff's attorney, who, of course, did not know.

What might he have done without extraordinary vigilance, but in the ordinary mode of getting knowledge used by sheriff's officers? He might have asked his man Pearsall what his sources of information were, and, in this way, gone back as far as possible to the facts. He might have made ordinary inquiries for persons or carts likely to take away that large amount of goods. He might have made inquiries at places where they would likely be left during the pendency of the attachment. On receiving the answer he did from McKnight, it would have been, I think, an ordinary step for him to go to the sheriff, O'Brien himself, and to call for the exercise of authority over McKnight. He knew, or might have known, that the goods in the store were more than sufficient levy under the attachment, and he could not, therefore, content himself with the presumption that the other goods had been taken away duly, in obedience to the commands of the

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Statement of the Case.

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attachment. That fact, in connection with an unnecessary and evident concealment by McKnight, was sufficient to apprise him that they were goods which should be applied to the execution. I think that if he had used the diligence required of him (*Hinmain v. Borden*, 10 *Wend.* 367; *Tomlinson v. Rowe*, *Hill & D. Sup.* 410), he would have learned the place where the property taken away was and what its value was.

There would then have been, to his knowledge, property of E. P. Sanger & Co. in this county of the value of thirteen thousand three hundred and eighty-eight dollars and eighty-nine cents (\$13,388 89). It is clear that deputy McKnight had no legal right to hold all this property under the attachment. He could lawfully hold only so much as would be sufficient to satisfy the attachment-plaintiff's demand.

There is some reason for believing—that is, if we rely on Schmitz's testimony—that the attachment was levied and used in the interest of E. P. Sanger & Co. to the knowledge of Algeo. The testimony is that McKnight gave up possession under the attachment as soon as the injunction in bankruptcy was served, viz. February 25, 1873. But it had not been then determined that E. P. Sanger & Co. were bankrupts. If McKnight was *bona fide* attempting to protect Algeo's interest, it is most likely that possession would have been maintained until the adjudication in March. But the proof is not sufficiently strong perhaps to show that Algeo was a party to such a use of the process as to require us to decide that Deputy Schmitz should have disregarded it.

But as it was manifest to deputy Schmitz that McKnight was making an excessive levy under the attachment, his duty to the executions he held required that he should take ordinary measures to have such parts of the property as were not properly attached relieved, so that he might levy. The least he could have done was to make a specific demand of McKnight that he

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should release whatever was in the store that was not necessary to secure the attachment, and, in case of a non-compliance by McKnight, to have made the same demand of sheriff O'Brien. We must deem that there would have been an obedience of law by public officers when the specific request was made. And if there had not been negligence in reference to the goods taken from the store, the executions might have been levied upon them also.

There would have been enough value to have fully paid the claim in the attachment suits and the three executions, including the present plaintiff's.

We have left out of view that part of one of the prior executions as to which the defendant returned *nulla bona*. There is authority for saying that the return binds him in this action, and that he can not contradict it, for the purpose of maintaining that the prior executions would have exhausted the leviable property of E. P. Sanger & Co. before plaintiff's execution could have been reached (*Patton v. Westervelt*, 2 *Duer*, 362). On February 24, 1871, an injunction was issued out of the bankruptcy court restraining all persons having property and goods of E. P. Sanger & Co. from parting with them. This was some time before they were declared bankrupts. As we have seen, on that day McKnight gave possession of the goods in the store to defendant's deputy, and the latter went into possession about March 11, 1871. The marshal serving the warrant in the bankruptcy proceeding claimed a right to take these goods. The defendant's deputy claimed to hold them only for the benefit of the two first executions. By consent and order of the bankruptcy court these goods were sold, and the various claims transferred to the proceeds. The case does not show particularly what the sheriff claimed in respect of the goods taken away by deputy McKnight. The attachment itself was dissolved by the bankruptcy

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proceedings. I think there can be no doubt that the defendant made no claim whatever as against these latter goods, in the bankruptcy court in behalf of the present plaintiff. If he had not been negligent, there would have been what is tantamount to a levy in behalf of the plaintiff's execution—that is, there would have been a levy under that execution, or under some other, which would have inured to its benefit. Irrespective of the effect of the bankruptcy, the proof is, the plaintiff would have recovered the full amount of his execution, and therefore that he has been damaged in that amount.

I do not think that any consideration arising out of the bankruptcy proceedings mitigates the damages. What would have been the effect of the sheriff's litigating in behalf of plaintiff's executions in the bankruptcy court, after notice to plaintiff of the proceeding, in case of an adjudication against the claim, does not call for answer here, inasmuch as there was no such adjudication, and no such claim or notice. The defense then rests upon the suggestion that if the defendants had so acted in behalf of the plaintiff that the latter had an interest in a levy, it would have resulted in no benefit to the plaintiff, because the bankruptcy court, in that very proceeding, adjudged that the assignee had a right to the property free of the two prior executions founded on judgments declared to be in violation of the bankrupt act, and that the plaintiff's judgment would have met a similar fate, or because this latter judgment was in violation of the bankrupt act. I think this is speculative. The two prior judgments might have been against the bankrupt act, and the plaintiff's judgments might not have been. The late decisions of the supreme court would uphold it. It certainly would not have been disregarded, if the assignees in bankruptcy had not seen fit to question it. It was valid, except as they might take advantage of any defect, if there

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Appellant's points.

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were one. It is not the sheriff who can make this claim for the assignees. He owes fidelity to the process issued in behalf of the plaintiff. The assignee might never have made an attempt to impeach that process.

In substance, under sections 35 and 39 of the bankrupt act, the assignee has a chose in action by which "he may recover the property or the value of it from the person so receiving it or so to be benefited," or "may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this act; provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended and that the debtor was insolvent." The defendant has no right to diminish the plaintiff's claim against him, by showing (if he could) that facts exist which would have put it in the assignee's power to take the goods levied upon, or recover their value if the proceeds had been paid to the plaintiff. Section 35 says that the mode of getting the preference is void. That is the equivalent of language used in our own statutes against fraudulent conveyances, and means void in favor of those against whom it is considered or declared a fraud. If the assignee might have succeeded, but if he never took the necessary steps to assert his claim, the sheriff has no right to dispose of the plaintiff's interest in property on the supposition that the assignee might have asserted and maintained his claim.

The plaintiff should have judgment for four hundred and nine dollars and thirty-three cents and interest.

*Brown, Hall & Vanderpoel*, attorneys, and *J. Sterling Smith* and *A. J. Vanderpoel*, of counsel, for appellant, urged;—The plaintiff failed to show any property out of which the defendant could have collected the said execution, or any portion of

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Appellant's points.

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it. I. On January 12 the property was all at the Broome-street store, with the exception of twenty-five cases of hats, which were at Algeo's shop; but on January 14, Sheriff O'Brien removed some of the goods from the Broome-street store to Bogert's, and afterwards took them to Topping's; and on January 25, said O'Brien removed the hats that were at Algeo's to Topping's also, so that on February 1, there was no property belonging to E. P. Sanger & Co., except what was in the Broome-street store, and the property at Topping's, all of which was in ex-Sheriff O'Brien's custody.

II. The defendant could not have collected the plaintiff's execution out of the property which was in the Broome-street store on February 1. There was not enough of it to satisfy the Tenth National Bank executions. The property was sold by Wilmerding, Hoguet & Co., and the proceeds, amounting to eight thousand two hundred and thirty-nine dollars and twenty-five cents, were paid to and held by the defendant, pursuant to an order of the bankruptcy court. The amount of the Tenth National Bank executions which the defendant held was nine thousand eight hundred and fifty-four dollars and forty-eight cents, exclusive of interest, and were prior to the plaintiff's execution.

III. The defendant could not have collected the plaintiff's execution out of the property at Topping's. The property was already in custody of the law in O'Brien's possession, and the defendant could not levy on it. "Property once levied on, remains in custody of the law, and it is not liable to be taken by another execution in the hands of a different officer" (Hagan v. Lewis, 10 *Peter U. S.* 402-3; Dubois v. Harcourt, 20 *Wend.* 41; Van Loan v. Kline, 10 *Johns.* 135; Hartwell v. Bissell, 17 *Id.* 128; Knox v. Smith, 4 *How. U. S.* 298; Taylor v. Carryl, 20 *Id.* 583).

IV. The plaintiff may urge that, although the de-



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Appellant's points.

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fendant had not the right to the possession of the property which was at Topping's, and could not have taken and sold it; nevertheless, if he had made an informal levy on it in O'Brien's hands, or levied upon the property subject to the right of O'Brien, he would have obtained a lien upon it, which would have followed the property into bankruptcy, and could have been asserted against the assignee in the bankruptcy court. The learned judge who tried the case seemed to have had some such idea, and to have been largely influenced by it in deciding the case. But there can be no informal levy upon property not subject to levy; and, as we have already shown, this property being already in the custody of the law, could not be levied upon by the defendant. Nor could the defendant have levied upon the property subject to the right of O'Brien's levy. The interest of E. P. Sanger & Co. in that property, on February 1, 1871, was a residuary interest, or the right to the surplus after O'Brien had satisfied his claim, and such an interest can not be levied upon under an execution. Under an execution only goods and chattels can be taken, and there can be no levy where the sheriff at the time of making the same has no right to proceed and sell the property. In the case of pledged property, the pledgor's interest can now be levied on, but that is by express statutory provision, and in that case the sheriff can take the property and sell it (3 *R. S.* 5 ed. 645, § 20; *Steif v. Hart*, 1 *Coms.* 20).

V. The learned judge who tried the case seems to have regarded the levy of O'Brien as excessive, and to hold the defendant responsible for it. It undoubtedly was excessive after the other attachments in his hands had been withdrawn; but O'Brien is liable for that, and not the defendant. O'Brien had a valid attachment, and the defendant had no power or authority to compel O'Brien to release to him any of the property.

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Appellant's points.

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Evidently O'Brien believed he had more property at Broome-street than was necessary to satisfy the attachment claim, for as soon as he knew defendant had received the Tenth National Bank executions he removed from Broome-street property enough to make him safe, and kept the fact concealed from the defendant. He did not, however, give up his levy on the property remaining in the Broome-street store until the petition in bankruptcy was filed, and the learned judge who tried this case finds fault with him for giving it up as soon as he did, and attempts to draw conclusions unfavorable to the defendant, because O'Brien did not hold on to the said property in Broome-street until the bankruptcy proceedings had proceeded far enough to vacate the attachment, although O'Brien retained until that time this property at Topping's, which was ample to protect the attachment claim. Also, if O'Brien had at any time released all of the property which he held in excess of what was properly held under the Algeo attachment, it would have been inured, as it did, to the Tenth National Bank executions, and not to the plaintiff.

VI. The petition in bankruptcy against E. P. Sanger & Co., was filed February 24, 1871; they were adjudicated bankrupts March 11; the warrant of seizure was issued to the marshal March 14; and the assignment was executed to the assignee April 15, 1871. The defendant could not, therefore, have levied on any of this property after February 24, 1871, even though he had known where it was, and no injunction had been issued by the bankruptcy court restraining him from doing so (*Miller v. Bolles* [*N. Y. Ct. of Ap.*], reported in 10 *Nat. Bk. Reg.* 515; *Miller v. O'Brien*, 9 *Id.* 26). A principal inquiry in this case, therefore, becomes narrowed to the question whether or not the plaintiff has shown there was property within the city and county of New York, between February 1 (the day

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Respondents' points.

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plaintiff's judgment was docketed and execution issued), and February 24, 1871 (the day the petition in bankruptcy was filed), from which the defendant ought, by the exercise of due and reasonable diligence, to have collected the execution.

In addition to the reasons before given the judgment below is erroneous for the additional one that the defendant did not have notice of any property out of which he could collect said execution, nor is the plaintiff now able to point out the existence of any such property. The learned judge evidently based this finding upon the idea that the property at Topping's could have been levied on by the defendant if he had known where it was, and that knowing that property had been removed from Broome-street, he was negligent in not following it up and ascertaining where O'Brien had stored it, and what it consisted of. He does not find that defendant knew of the property at Topping's, but that he "had notice" of it. The question of defendant's diligence in ascertaining what property ex-sheriff O'Brien had removed from the Broome street store was immaterial.

*Brownell & Lathrop*, attorneys, and *S. B. Brownell*, of counsel, for respondents, urged ;—The defendant, Brennan, is liable to the plaintiff for the false return and neglecting to make the money upon his execution. Defendant's neglect was his allowing five thousand and forty-nine dollars and sixty-four cents of the goods levied on by him on January 12, 1871, to be removed from his control, and suffering them to go to the marshal in bankruptcy without making any claim to them under plaintiff's execution or notifying the plaintiff so that he could indemnify the defendant or make a claim in the bankruptcy court, and returning the plaintiff's execution and thus preventing the plaintiff making any claim in the bankruptcy court. This neglect lost the plaintiff his execution. It is idle to

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Opinion of the Court, by CURTIS, J.

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say that the defendant had no notice of these goods, for he actually levied on them on January 12, 1871, and that levy enured to the benefit of the plaintiff's execution when it came to defendant's hands without a new levy. A levy under one execution, even though it has become dormant, enures to the benefit of a subsequent execution (*Peck v. Tiffany*, 2 *Coms.* 451; *Camp v. Chamberlain*, 5 *Den.* 198; *Rev. Stat.* p. 3, ch. 6, tit. 5 § 1, 314, &c.). A levy under one execution enures to the benefit of a second execution subsequently coming to the same officer (*Van Winkle v. Udall*, 1 *Hill*, 559; *Birdseye v. Ray*, 4 *Id.* 159; *Russell v. Gibbs*, 5 *Cow.* 395; *Oresson v. Stout*, 17 *Johns.* 116). It is equally idle to say that he could not have made the amount of plaintiff's execution from them, on account of the Algeo attachment, for there are two thousand and forty-seven dollars and sixty-nine cents, or five times the amount of plaintiff's execution beyond the Algeo attachment. *Lovick v. Crowder*, 8 *Barn. & Cress.* 132, is in point. The sheriff was held liable for negligence in not asking to see the warrant under which the former sheriff claimed to hold the goods (*Cited and approved, Paton v. Westervelt*, 2 *Duer*, 386). "When he was informed that the officer of the former sheriff claimed it under a levy, it was the defendant's duty to ask to see the warrant or execution. If he had done that, he would have seen from its date that there had been such gross delay as rendered it fraudulent and void."

BY THE COURT.—CURTIS, J.—The defense set up in the answer, that the plaintiff's judgment and execution, were obtained and issued to procure a preference in violation of the bankrupt law of the United States, and therefore void, was in view of the recent decisions, and especially that of the United States supreme court in *Wilson v. City Bank* (17 *Wall.* 489), not pressed

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at the argument, and it becomes unnecessary to consider it here.

The evidence shows that O'Brien, the late sheriff, by McKnight, a deputy, previous to January 1, 1871, had levied upon the goods of Sanger & Co., at their store in Broome-street, under an attachment for three thousand dollars issued in a suit wherein one Algeo was plaintiff. On January 12, 1871; the defendant's deputy, Schmitz, went to this store with the two executions in favor of the Tenth National Bank, amounting to nine thousand eight hundred and fifty-four dollars and forty-eight cents, to levy, and made, what he calls, an informal levy. McKnight was in possession, and refused to let him have access to the goods, or possession, or to let him make an inventory of them. Schmitz learning that the attachment case might be settled and McKnight go out, put one Pearsall on guard to notify him, so that he might then take possession.

On January 14, 1871, McKnight removed from the store goods of the value of five thousand and forty-nine dollars and sixty-four cents. Pearsall informed Schmitz of the removal. This was previous to February 24, 1871. Plaintiff's execution was placed in Schmitz's hands to be levied February 1, 1871. It does not appear that Schmitz was informed of the value of the goods removed, or to what place they were taken. It was his duty to use due diligence to find property to pay the three executions.

The liability of the defendant depends upon the conduct of his deputy in respect to these goods.

It was considered by the learned judge at the trial, that if the goods were held regularly and in compliance with law under the attachment, the defendant's deputy had no power to seize or take possession of them, or any part of them. This question was fully discussed at the argument, but in the view here taken of the case it will not be necessary to consider it.

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It is difficult to say, that when an attachment has been levied on the property of a defendant, a sheriff into whose charge executions come to be levied on the same defendant's property, owes no duties to the plaintiffs in respect to their enforcement. The property may be, as is claimed, in the custody of the law, and not liable to be taken by another execution in the hands of a different officer, yet, can there not be circumstances that call on the sheriff to exercise a reasonable care and diligence in the matter?

For instance, in the present case, where an attachment was issued for three thousand dollars to be levied and used in the interest of E. P. Sanger & Co., with the knowledge of Algeo, as the court considered there was some reason for believing if Schmitz's testimony was to be relied on, and where the assets of E. P. Sanger and Co. amounted to between eighty thousand dollars and ninety thousand dollars, and the sheriff's deputy, Schmitz, holding the executions, was notified that a part of the goods claimed to be seized under the attachment, were removed in a concealed and surreptitious manner by their custodian, it is very difficult to hold that the sheriff did not owe the duty to the plaintiff of asking the watchman, Pearsall, who informed him of it, what information or knowledge he had about their removal, or of making common inquiries for persons or carts likely to remove that large amount of goods, or of asking to look at the warrant of attachment, or of applying to Sheriff O'Brien himself about the removal, or of calling upon him to release from the levy of the attachment all goods beyond what was necessary to secure the payment of the three thousand dollars and sheriff's fees.

A proper regard for the administration of justice, has always led courts to inflexibly require the exercise of diligence and fidelity in the execution of process, from all officers to whom the law confides it for execu-

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Opinion of the Court, by CURTIS, J.

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tion. Upon the officers charged with the execution of process, from the highest to the lowest, the law confers great powers, and extends to them the amplest protection consistent with the proper discharge of their important duties.

The evidence shows that the deputy Schmitz, omitted to make those inquiries in reference to the goods removed, most likely to afford him information about them. They were not taken from the city, and there does not appear to have been any substantial reason why he did not learn where they were. It is true, Schmitz testifies he asked the plaintiff's attorney what had become of the goods, and also McKnight and his man and one of the firm of E. P. Sanger & Co. The plaintiff's attorney, of course, did not know, and the member of the firm of Sanger & Co., and McKnight's man, refused to answer, and referred him to McKnight, who amply satisfied the deputy's anxiety and diligence in the matter, by declining to give him any information on the subject.

After this weak and brief investigation, the defendant's deputy remained tranquil, communicating in no way to the plaintiff's attorney the very suspicious features of the transaction apparent upon its face, and and not acting himself or pushing any further inquiries, or taking any of those steps that would in the exercise of common and ordinary care and diligence have brought to his knowledge property of E. P. Sanger & Co., in this county, of the value of thirteen thousand three hundred and eighty-eight dollars and eighty-nine cents, being more than enough to pay off the attachment and the three executions, all of which amounted to thirteen thousand three hundred and sixty-three dollars and eighty-one cents, including the present plaintiff's. There was an entire omission on the part of the defendant to give information to the plaintiff of this manifestly excessive levy, so that he might be

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Opinion of the Court, by CURTIS, J.

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enabled to seek relief, nor did the defendant's deputy make any demand on sheriff O'Brien, or apply even to have some part of the property relieved from the attachment.

On February 24, 1871, proceedings in bankruptcy were taken against E. P. Sanger & Co., and under these the sheriff was allowed to sell the goods levied upon in the store in Broome-street. These realized eight thousand two hundred and thirty-nine dollars and twenty-five cents. The goods that were surreptitiously removed from the store were sold for five thousand and forty-nine dollars and sixty-four cents. The attachment for the three thousand dollars was dissolved by the bankruptcy proceedings, and the two executions in favor of The Tenth National Bank were set aside by the United States circuit court as void, on the ground that the bank had reasonable cause to believe E. P. Sanger & Co. were insolvent at the time of the levy. The defendant returned the plaintiff's execution unsatisfied. All the property of E. P. Sanger & Co. passed into the custody of the marshal in bankruptcy while the defendant held the execution, yet he made no claim under it, and gave no notice to the plaintiff, so that he could indemnify the defendant, or make a claim himself in the bankruptcy court.

It is idle to speculate, as to what would have been the fate of the plaintiff's execution and judgment under the bankruptcy proceeding. There is every reason, from the proofs and the recent decisions, to believe they would have been sustained, and it was for the assignee in bankruptcy, and not the defendant, to raise the objection.

Upon considering the questions raised by the defendant, it seems to be clearly settled by the adjudications of the courts, and as absolutely necessary for the proper administration of justice, that a sheriff to whom an execution is issued, is bound to use all reasonable



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endeavors to execute the process of the law, in the most effectual manner. As a mere agent he would be required to exercise at least the ordinary diligence that persons of common prudence are accustomed to use about their own business and affairs. Voluntary ignorance, or that which arises from a neglect to make proper search or inquiries, will not excuse him. His duty is to inquire of those who would probably be acquainted with what the due execution of his process requires him to ascertain, and when he searches, to search in localities where it was probable he might find what he was called upon to find. When he holds various executions against the same defendants, it is a breach of duty for him to lend himself to one party to the wrongful prejudice of another, or to withhold information from one party of proceedings that may wrongfully deprive him of his remedy, and he has been held liable for negligence in not asking to see the warrant under which the former sheriff claimed to hold the goods (*Tomlinson v. Rowe*, *Hill & Den. Sup.* 410; *Henman v. Borden*, 10 *Wend.* 369; *Phil. Ev. C. & H.* notes, p. 692, ed. 1859; *Warmoll v. Young*, 5 *Barn. & Cress.* 660; *Lovick v. Crowder*, 8 *Id.* 132; *Dean v. Macknamara*, 5 *Dowl. & Ryl.* 95).

Applying these rules to the conduct of the defendant's deputy with the plaintiff's execution, it is apparent that he was guilty of neglect, and that there was a failure to exercise ordinary diligence, and that by his omission to take proper steps and to make proper inquiries, and of the persons likely to know, and also by his failure to notify the plaintiff of the proceedings in bankruptcy, so that he could make his claim in the bankruptcy court, the plaintiff lost the benefit of his execution. There was that failure of diligence on the part of the defendant that entitles the plaintiff to recover against him, and the judgment appealed from should be affirmed, with costs.

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Statement of the case.

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We think, however, there are questions of law involved, which ought to be reviewed in the court of appeals. We will, therefore, enter an order under Laws of 1874, ch. 322, to that effect, if desired by the appellant.

MONELL, Ch. J. (concurring).—I concur in affirming the judgment, and in the entering of the order above mentioned.

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ELISHA D. WHITNEY, PLAINTIFF, v. THE  
MAYOR, ALDERMEN, AND COMMONALTY  
OF THE CITY OF NEW YORK, DEFENDANTS.

I.—EMPLOYEE OF MUNICIPAL CORPORATION.

1. ACTION FOR HIS SALARY, WHAT NOT A DEFENSE TO.

1. *Absence.*

- a. When his duties do not absolutely require his presence every day at the office of another officer of the corporation, *his omission to be present* on numerous days (his attendance on them not being necessary to the faithful discharge of his duties), *forms no defense* to an action for his salary.

II.—TRIAL.

1. PROPOSITION OF LAW, ERRONEOUS.

a. *When not cause for reversal.*

1. When the judge at the trial lays down a proposition of law, the converse of which, if charged, would not have called for or justified any different determination of the case than that arrived at, and ought not in law to any way affect the determination, it is unnecessary, on appeal, to consider whether the proposition is correct or not; the proposition being immaterial, its error (if it be erroneous) presents no cause for reversal.

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Opinion of the Court, by CURTIS, J.

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Before FREEDMAN, CURTIS, and SPEIR, JJ.

*Decided February 1, 1875.*

Exceptions ordered to be heard in the first instance at the general term.

*E. Delafield Smith*, for defendants.

*R. H. Strahan*, for plaintiff.

The facts sufficiently appear in the opinion.

BY THE COURT.—CURTIS, J.—The plaintiff sues to recover for five months' services by one Riordan, his assignor, as assistant inspector in the department of finance of the city of New York. Riordan's salary was two thousand dollars per annum, and he was duly appointed to the office. The plaintiff's assignor testifies that he went every day to the comptroller's office during this period, but that his official duties were to inspect sewers, street paving, piers, and other work being performed for the city, and that he duly attended to all such duties. The only evidence claimed to be in conflict with this, is the testimony of an employee in the comptroller's office, that plaintiff's assignor was absent therefrom a number of days during the five months, as appears by the witness's *memoranda*. The witness at first declined to swear that he himself was present every day, and actually observed the absence, but on referring to his book he did so.

There was no evidence that the duties of assistant inspector required Riordan's presence every day in the comptroller's office, or that he failed to perform his duty, or was absent from the comptroller's office negligently, or unnecessarily.

After the parties rested, the defendants' counsel

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asked leave to go to the jury on the question of the performance of duty, which was denied, and the defendants excepted.

Thereupon the defendants' counsel requested the court to charge the jury that under the evidence the defendants are entitled to a deduction from the amount of the claim, by reason of the absence of the plaintiff, which was denied, and the defendants excepted.

The defendants also asked the court to submit to the jury the question whether or not the defendants are not entitled to have deductions made from the plaintiff's claim, on account of Riordan's absence from duty, which was denied, and the defendants excepted.

The court directed a verdict for the plaintiff for one thousand and nine dollars and twenty-one cents, and the defendants' counsel excepted.

There was no question of the performance of duty, raised by the evidence, and there were no absences shown that were inconsistent with its performance; there was nothing to go to the jury, and the court properly directed a verdict for the plaintiff, and declined to charge the jury and submit questions as requested by the defendants' counsel.

It is stated in the case, that the court ruled that this being a salaried office, where the salary is fixed by law, the officer is entitled to his salary, notwithstanding he fails to perform any duty, as long as he is continued in the office, and the defendants excepted to the ruling.

This was merely a legal proposition advanced by the court, and not based on any evidence of a failure to perform official duty, and though designated in the case as a ruling of the court, simply presents a question that does not arise in the controversy, and the determination of which, in whatever way, did not and could not, affect or prejudice the defendants, and

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which, in view of the uncontradicted evidence of due performance of duty, it is unnecessary to consider.

Defendants' exceptions should be overruled, and judgment ordered for plaintiff on the verdict, with costs.

FREEDMAN and SPEIR, JJ., concurred.

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DAVID HEXTER, PLAINTIFF and RESPONDENT,  
v. CHARLES KNOX, DEFENDANT and APPELLANT.

I. MEASURE OF DAMAGES.

1. LESSOR AND LESSEE.—HOTEL.

1. *Breach of covenant to put in possession.*

a. When a lessor owning a building and being about to erect a new one adjoining it and to be connected with it, leases the old one and the one to be erected, for hotel purposes, covenanting to make certain repairs in some of the rooms in the old building and to finish the new building (which should contain a certain number of rooms), by a specified time, and that such rooms should be ready for occupation, and possession thereof should be given by such specified time, and the rooms were not ready for occupation until some time after the specified period,

HELD,

the evidence showing that rooms in a hotel, both furnished and unfurnished, have their value for use, varying with certain periods of the year, which is known and provable,

that,

1. *The lessee's measure of damages* was the proved value of the use of furnished rooms for such of the rooms for which he had furniture, and for the others the proved value of unfurnished rooms.

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a. This measure is not open to the objection that it involves the allowance of *contingent profits* for the use of the furniture, or of profits contingent on the use of the hotel by guests.

2. The *allowance* for the value of the use *must be varied* according to the season of the year.

## II. LESSOR AND LESSEE.

1. BREACH OF COVENANT BY LESSOR TO REPAIR, TO RESTORE, TO PUT IN ORDER, OR TO REPLACE OLD APPURTENANCES WITH NEW.

1. *Option of lessee.*

a. He has the right to *make the repairs, &c.*, being judicious and reasonable in his expenditure, and *recover the expenses* from the landlord,

or

*Omit to make the repairs, &c., and sue for his damages.*

## III. ESTOPPEL.—WAIVER.

1. WHAT WILL NOT OPERATE AS.

a. The fact that a party who has an interest in having certain work well done, and the materials furnished therefor of a certain quality, *stands by and sees* work done and materials used of a character inferior to that called for, *will not operate* as an estoppel or waiver of his right to thereafter object, *where it does not appear that the party has sufficient knowledge* to enable him to detect the defects and make the proper objections thereto.

## IV. CONTRACT.—DELAY IN COMPLETION.—STRIKE OF WORKMEN.

1. DAMAGES CAUSED BY, WHAT NOT A DEFENSE TO.

a. The fact that a *part of the delay* which occurred after the time limited for the completion was *caused by a strike* of the workmen which took place after that time, is *no defense* to a claim for *damages suffered by that part of the delay.*

Before FREEDMAN, CURTIS, and SPEIR, JJ.

*Decided February 1, 1875.*

Appeal from judgment.

Prior to April, 1871, the plaintiff was in possession, as tenant of the defendant, of the hotel building at the

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northwest corner of Broadway and Spring-street, known as the "Prescott House," and of the adjoining building, No. 97 Spring-street, in the city of New York, also used in connection with same for hotel purposes. On April 28, 1871, the plaintiff and defendant executed a lease, by which defendant demised to the plaintiff the "Prescott House," and the five stories of a new building about to be erected by him on the lots Nos. 97 and 99 Spring-street (with certain exceptions stated in said lease), for the term of eight years, from May 1, 1871, at the annual rent of twenty-two thousand five hundred dollars, payable quarterly. The defendant covenanted that the portion of the building 97 and 99 Spring-street, demised to plaintiff, should contain five stories, should be built in a substantial and workmanlike manner, and of good materials, according to the plans and specifications of D. & J. Jardine, already prepared, and should contain gas-pipes leading from the street level to all the halls and rooms thereof, and water-pipes with proper connections for the supply of all the rooms and halls of the said new building; and that the said new building should be finished and ready for occupation, and possession thereof given to the said plaintiff on or before September 1, 1871. Also, that the defendant would, on or before September 1, 1871, complete and finish all the alterations and repairs to the old part of the premises then in plaintiff's occupation, which were included in a specification made by D. & J. Jardine.

The complaint alleges that the new building was not ready for occupation, or possession thereof given to plaintiff on September 1, 1871, nor for five months thereafter. That the new building was not finished in a substantial and workmanlike manner, or of good materials, and did not contain water-pipes for the supply of all the rooms. That defendant did not, on or before September 1, 1871, finish the alterations or repairs to

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the old building. That defendant failed to do several things called for by the specification made by D. & J. Jardine, and claimed he had expended fifteen thousand dollars in the performance of the work agreed to be done by the defendant, and that the plaintiff, by reason of defendant's defaults and omissions, had been compelled to incur expense in completing works covenanted to be performed by defendant, and in repairing and making good the defects and imperfections in the work performed by him, to the amount of fifteen thousand dollars, and had sustained damage by loss of custom in his business, and by labor and inconvenience by reason of defendant's neglect and default, to the further amount of twenty thousand dollars, and demanded judgment for damages to the amount of thirty-five thousand dollars.

There was a verdict for plaintiff for seventeen thousand one hundred and seven dollars, and from the judgment entered upon the verdict, the defendant appeals.

*William McDermot*, attorney, and of counsel, for appellant, urged ;—I. The rule laid down by the judge as to the measure of damages allowed profits in the hotel business. It allowed a profit on the use of the furniture, and was contingent upon the use of the hotel by guests. It gave plaintiff what he could earn by the use of the rooms in his hotel business. Such damages can not be allowed (*Griffin v. Colver*, 16 *N. Y.* 489). There is no averment of bad faith or fraud on the part of the defendant, or that he willfully or wrongfully refused possession to plaintiff. The defendant must be treated either as a contractor who agreed to erect the new building within a specified time, or as a landlord who covenanted to give possession of the new building on the first of September. If defendant is treated as a contractor, on failure to finish the



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building in time, the plaintiff would not be entitled to recover the rent of the hotel furnished. That would depend upon too many contingencies. It would depend upon the style and character of the furniture and the extent to which it was furnished. The only true rule, in the absence of fraud, is to allow such damages as plainly entered into the minds of the parties, *i.e.*, the rent of the building in the condition in which defendant was to leave it (unfurnished) (*Ruff v. Rinaldo*, 55 *N. Y.* 664). If defendant is to be treated as a landlord who failed to give possession of the premises at the time agreed upon, then plaintiff would not be entitled to recover for the use of the rooms furnished, under the rules established by the following cases: *Giles v. O'Toole*, 4 *Barb.* 261; *Kinney v. Watts*, 14 *Wend.* 41; *Peters v. McKeon*, 4 *Den.* 549; *Conger v. Weaver*, 20 *N. Y.* 146; *Bush v. Cole*, 28 *Id.* 270; *Academy of Music v. Hackett*, 2 *Hill.* 217; see also, *Noyes v. Anderson*, 1 *Duer*, 353; *Blanchard v. Ely*, 21 *Wend.* 348; *Morris v. Phelps*, 5 *Johns.* 49; *Guthrie v. Pugsley*, 12 *Id.* 126; *Wager v. Schuyler*, 1 *Wend.* 553; *Trull v. Granger*, 4 *Seld.* 115. The case of *Myers v. Burns* (33 *Barb.* 401, and 35 *N. Y.* 269), on which plaintiff relies, does not apply to this branch of the case. That was an action for damages for not making repairs to a hotel used as a hotel. It does not appear that the distinction between rooms furnished and unfurnished was raised.

II. In respect to the loss of the use of rooms in the old part, caused by the failure of defendant to make the repairs agreed upon properly, or in time. (1) The charge of the court was erroneous for the reasons above stated. (2) The refusal of the court to charge as requested—"That if plaintiff knew of a defect which caused damage he was bound to have it repaired as soon as it could reasonably be done. If he did not do so, and damage subsequently accrued, he can not

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recover for such subsequent damage ;" also—"That the plaintiff can not recover for the use of the rooms which were injured by leakage or settling except for the time it would necessarily take to repair the rooms," was error. The law imposes upon a party subjected to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible ; and if the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him (*Hamilton v. McPherson*, 28 *N. Y.* 72 ; *Baker v. Drake*, 53 *Id.* 211 ; *Shannon v. Comstock*, 21 *Wend.* 461 ; *Heksher v. McCrea*, 24 *Id.* 309).

III. The court erred in charging the jury that the value of the rooms must be varied according to the season of the year (*Griffin v. Colver*, 16 *N. Y.* 489).

IV. The court erred in refusing to charge, as requested by defendant's counsel, "That if plaintiff was present during the performance of the work, and saw the quality of the materials and workmanship, and made no objections to the quality of the work and materials, he can not after the work is done, make such objections (*Sinclair v. Tallmadge*, 35 *Barb.* 602 ; *Wyckoff v. Myers*, 44 *N. Y.* 143).

V. The court erred in refusing to charge as requested by defendant's counsel, in respect of the coal vault.

VI. The court erred in refusing to charge as requested by defendant's counsel, in respect of the boiler. By the contract defendant had the option to either remove the boiler in rear of the hat store, or put in a new one. The plaintiff was bound to do that which would cause the least damage to defendant, if equally good, within the principle of the cases cited under second point.

*Buckham, Smales and Walker*, attorneys, and

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*Stephen A. Walker*, of counsel, for respondent, urged:—I. The charge of the judge as to the measure of damages was correct (2 *Greenl. Ev.* 210; *Brown on Com. Law* [631, 640], Am. ed. 1856; *Griffin v. Colver*, 16 *N. Y.* 489, overruling the doctrines in *Sedg. on Dam.* ch. 3, p. 57, ed. 1868; *Myers v. Burns*, 35 *N. Y.* 269; *Ruff v. Rinaldo*, 55 *Id.* 664).

II. The injury complained of being voluntary and wrongful, the plaintiff was under no obligation legal or moral, to take any steps to mitigate the consequences to the defendant (*Heany v. Heany*, 2 *Den.* 625).

BY THE COURT.—CURTIS, J.—The questions presented by the defendant arise chiefly upon exceptions to the charge, and refusals to charge, of the judge at the trial, and relate mainly to the rules of damages charged by the judge.

The plaintiff's claim for damages was of a three-fold character.

1. Damages for loss of the use of rooms in the new building by reason of its not being finished in time.

2. Damages for the loss of the use of rooms in the old part caused by the failure of defendant to make the repairs agreed upon.

3. Money expended by plaintiff in making repairs agreed to be done by defendant.

The court charged that for such of the rooms as the plaintiff had furniture for, he was entitled to the value of the rental of furnished rooms for hotel purposes; and that for such of them as he did not have furniture for, to the value of their use and occupation as rooms to be let without furniture. Exceptions were taken to this by the defendant.

The terms of the lease, the provisions for the arrangement of rooms, and the entrance to the new building from the old, and the supply of water and steam pipes from the old building to the new, indicate

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that it was in the contemplation of the parties when the lease was made that the new building was designed as a hotel and for no other purpose, and as such to be used in connection with the old building.

There was evidence that the plaintiff had on storage in a large room of the old Prescott House, all the furniture removed from the former four story house, 97 Spring-street, and had also, for a considerable period, all the furniture removed from the rooms in the old Prescott House, which were uninhabitable from leakage.

The defendant objects to this instruction to the jury on the ground that the rule laid down by the judge, allowed profits in the hotel business; that it allowed a profit on the use of furniture, and was contingent upon the use of the hotel by guests, and that it gave plaintiff what he could earn by the use of the rooms in his hotel business, and that it is based upon uncertain and contingent profits which the law excludes.

This is not a just criticism of the rule of damages stated by the judge in respect to the loss of the use of these rooms, or of the effect of such rule. That rule simply instructed the jury to give the plaintiff that compensation for the loss of the use and occupation of those rooms for which he had furniture, as the evidence showed the use and occupation of such rooms furnished for hotel purposes was worth, and also for those rooms for which he did not have furniture, such compensation as the evidence showed their use and occupation was worth.

It was right that the plaintiff should be compensated for the loss of the use of the rooms of which he was deprived by the defendants' default. The evidence shows hotel rooms furnished, have their value for use varying with certain periods of the year. The value of such use can be shown like the value of the use of any other property. The premises were leased by the defendant to the plaintiff

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for hotel purposes, which contemplates the provision of suitable furniture for the rooms for the use of such persons as the plaintiff in his business as a hotel keeper should let them to, and when deprived by the defendant of the use of a part of them he should be compensated by being allowed the proved value of such use for such purpose. This measure of damages is not based upon the incident of a profit upon the use of furniture, if such there is, nor upon any contingent profits or contingent use of the hotel by guests, but upon the fair market value of the use of furnished hotel rooms. In all large civilized communities the use of this description of rooms prevails extensively, and necessarily has a value known and easily proved.

The same principles apply to that part of the charge, where the court instructed the jury, that the plaintiff as to such rooms as he did not have furniture for, was entitled to the value of the use and occupation of those rooms to be let without furniture, as it was shown to them by the evidence.

The decision in *Myers v. Barnes* (33 *Barb.* 401, and affirmed 35 *N. Y.* 269) sustains the rule indicated by the court.

The court charged substantially the same in respect to the plaintiff's loss of the use of the rooms in the old part of the hotel caused by defendant's failure to make the repairs he covenanted to make properly and in time. The defendant excepted to this, but the same principles must apply that governed in regard to the rooms in the new part.

The defendant claims that the judge erred in charging the jury that the value of the rooms must be varied according to the season of the year. The evidence showed that at certain periods of the year the value of the use of the rooms was much greater than at other periods, and it was just to both parties that the jury should be so instructed.

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The defendant excepted to the refusal of the court to charge "That if plaintiff knew of a defect which caused damage, he was bound to have it repaired as soon as it could reasonably be done, and if he did not do so and damage subsequently accrued, he can not recover for such subsequent damage." The claim of the plaintiff was for damages occasioned by the defendant's failure to comply with his covenants, and when the defendant failed to make the repairs and restorations called for, the plaintiff had the usual option of a tenant, either to make the repairs in the exercise of his best judgment, being judicious and reasonable in his expenditures, and recover the expenses incurred from the landlord, or else to omit to make the restoration and repairs himself, and sue for his damages (*Myers v. Burns*, 33 *Barb.* 407). The first remedy may be beyond the ability of a tenant, and without the last he would be left remediless. Neither is there force in the objection that if the plaintiff, the tenant, was present during the performance of the work, and saw the quality of the materials and workmanship, and made no objection, he waived his right to object afterwards. Few tenants, and in fact, few individuals in the community, have such a knowledge of the work and materials involved in the plumbing, steam supply pipes, and other features connected with the construction and fixtures of a large hotel, that their presence during the performance of the work and seeing the materials would enable them to make proper objections in reference to any defects. The law does not impose any such obligation upon a tenant, especially where it involves what would tax the ability of an accomplished expert.

The defendant also claims that the judge erred in refusing to allow evidence of a strike on the part of the workmen after September 1. This was after the period within which the defendant was to fulfill the agreement,

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and whether there was a strike or not, during his default, has no bearing upon the issues of the case. If the defendant had wished to protect himself from the consequences of such contingencies, he should have done so by a provision in his agreement.

As the case does not contain the plans and specifications for the new building referred to in the testimony, and in some of the exceptions, and as they have been brought in no other way to the attention of the court, it is difficult to pass upon the exceptions to which the omitted documents apply, and they will have to be disregarded on this appeal.

The defendant objected to the charge of the judge in respect to the use of the coal vault. The judge restricted the jury to such damage as the plaintiff had shown from not having been put in possession, excluding all claim for increased price paid in consequence of being compelled to purchase his coal at retail prices. The defendant excepted to the refusal of the court to charge that the plaintiff was only entitled to recover for the use of the coal vault for such length of time as it would take to clear it out, and to such expense as would have been required to do that.

There was nothing in the terms of the lease to require the tenant to clean out the rubbish and other contents of the coal vault to get possession of it, nor was there any such duty imposed upon the tenant otherwise. The principles governing this exception and that in respect to that part of the charge in relation to plaintiff's putting in a new boiler, have already been considered, and they can not be deemed to have any weight.

The defendant excepted to the refusal of the judge to charge, that if the plaintiff failed to pay his rent when it became due, he could not recover for any damages after such non-payment.

This defense was not interposed by the answer,

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which set up a non-payment of rent for the quarter expiring November 1, 1871, as a counter-claim. The reply sets up the pendency of an undetermined suit brought by the defendant against the plaintiff to recover this quarter's rent. This is the only evidence in respect to the non-payment, and as the counter-claim was withdrawn at the trial everything on that subject may be considered out of the case. The question, but for the withdrawal of the counter-claim, could have been determined at the present trial.

These constitute the exceptions in the case, to which the attention of the court was chiefly called at the argument. In looking through the case, there are many exceptions to be found, but none that constitute a sufficient reason for granting a new trial.

The judgment appealed from should be affirmed, with costs, to respondent.

FREEDMAN and SPEIR, JJ., concurred.

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JOHN JACOB ASTOR, PLAINTIFF AND RESPONDENT, v. THE MAYOR, &c. OF THE CITY OF NEW YORK, AND ANDREW H. GREEN, COMPTROLLER, DEFENDANTS AND APPELLANTS.

I. ASSESSMENTS FOR LOCAL IMPROVEMENTS IN THE CITY OF NEW YORK, INCLUDING THEREIN THE OPENING OF STREETS.

1. COURTS OF EQUITY, THEIR POWER TO SET ASIDE SUCH ASSESSMENTS.

- a. Even though the assessment *was originally invalid and void* and the act of 1872 [*Laws of 1872*, ch. 580, p. 1412] does not operate to validate it, yet by force of that act as ex-



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pounded by *Lennon v. Mayor of N. Y.* (55 N. Y. 861), courts of equity are deprived of the power, in suits commenced after the passage of the act, to declare such assessment void, and cancel them of record, and enjoin their collection,

## UNTIL

the assessment is sought to be enforced by the taking of the assessed property.

## 1. WHAT IS NOT A SEEKING SO TO ENFORCE.

a. *The entry of the assessment in the office of the comptroller of the city, among the entries of assessments confirmed is not.*

1. *This is not a proceeding for its collection.*

## 2. WHAT IS NOT SUFFICIENT EVIDENCE OF PROCEEDINGS HAVING BEEN TAKEN FOR COLLECTION.

a. *Admission that "proceedings have been taken towards its collection," is not.*

1. *There can be no inference from this, either that the land has been advertised for sale, or that it has been sold, or that a lease is about to issue under Laws of 1871, ch. 881,*

*especially*

*as the three years which must elapse before advertising for sale had not expired.*

## 2. REPEAL.

*Act of 1873 has not been repealed; its provisions have been extended by Act of May 2, 1874, ch. 818, p. 866.*

## II. ASSESSMENTS.

## 1. JURISDICTIONAL QUESTIONS ARISING OUT OF PROCEEDINGS TO IMPOSE, EFFECT OF.

a. *Semble.*—*The liability of parties assessed can not be affected by nice jurisdictional questions.*

Before MONELL, Ch. J., and CURTIS, J.

*Decided February 1, 1875.*

This is an appeal by defendants from a judgment vacating an assessment upon plaintiff's land and removing the entry thereof as a cloud upon plaintiff's

NOTE.—The decision at special term will be found in 87 N. Y. Sup. Ct. R. p. 589.

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title, and perpetually restraining the collection of it, and also an appeal from an order disallowing defendants' proposed amendments to the findings of fact.

The assessment was made under an act entitled "An Act in relation to the widening and straightening of Broadway, in the city of New York, and to regulate the practice in that proceeding," passed February 27, 1871, and confirmed by an order of the supreme court, made July 5, 1872.

The plaintiff alleges various acts, errors, and omissions in respect to the assessment, which he claims are fatal to its validity. This is controverted by the defendants. The assessment upon plaintiff's land amounts to about thirty-seven thousand dollars, and is for benefits claimed to have been received by the plaintiff, from the local improvement made in pursuance of the act of the legislature above referred to.

*Anderson & Young*, attorneys, and *Henry H. Anderson*, of counsel, for respondent, urged in respect of the points passed on by the general term;—I. The reliance of the defense is upon section 7 of chapter 580 of the *Laws of 1872* (2 *Laws of 1872*, 1416), and the case of *Lennon v. Mayor, &c. of New York* (55 *N. Y.* 361), decided since the trial of this case, but before its decision. (a) The statute, when carefully considered, will be found to be no obstacle to the relief given the plaintiff in this case. Its provisions have reference merely and evidently to omissions to advertise, or to irregularity in advertising any ordinance, resolution, notice or provision relating to or authorizing the improvement or work for which the assessment is afterwards laid, but not applying to the assessment itself. They also have reference to omissions or neglect of duty, and to defect in authority on the part of departments or officers of the municipal government, upon whose action the assessment depends, or to mere mat-

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- ters of detail or regularity not affecting any substantial right. To make the act applicable to the case at bar, it is necessary for the court to hold that non-service of process in a judicial proceeding is a mere irregularity, not a substantial error. (b) In the Lennon case the only objection to the assessment was the omission to advertise the resolution authorizing the improvement, after it had been passed by one board of the Common Council and before its passage by the other. No suggestion was made in that case of the neglect of any step in the progress of the proceedings to take the land required and to lay the assessment; but it appeared that after the resolution was actually passed, every step required by the law to be taken was taken. The court held that the act of 1872 cured the particular evil complained of. The case at bar is not controlled or affected by that of Lennon. Substantial injury has been done to the plaintiff in this case. He has been defrauded of a right secured to him by the constitution, and has had a cloud thrown upon his title to lands by proceedings conducted without regard to the statutes, the errors not appearing upon the record, but having been established in this suit by evidence and the findings of the court; and the plaintiff is about to be deprived of his property without due process of law—for such is the result of proceedings instituted under the act of 1871. (c) It is believed that the learned judge at special term, reading the opinion in manuscript, in some measure misapprehended the decision in the case of Lennon, in holding that the objection of the want of notice by publication, though otherwise fatal, was cured by the act of 1872. Even if notices by advertisement were covered by the act, the posting of notices in hand-bills was one of the requisites for effecting service of process, and this omission of itself is sufficient to take the case out of the act of 1872. But there is nothing in the act of

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1872, which deprives this court of jurisdiction to grant the relief asked for against an assessment laid by commissioners who had no power to make the same, and confirmed by a court having no jurisdiction over either the proceedings, the persons or the land assessed, by reason of fatal errors jurisdictional in character. In *McDaniel v. Correll* (19 *Ill.* 226, 228), an act had been passed to make valid a judgment when there had been a defective service of process. The court said, "If it was competent for the legislature to make a void proceeding valid, then it has been done in this case. This it will not be pretended they could do directly, and they had no more authority to do it indirectly by making proceedings binding upon them which were void at law." (d) But the legislature did not intend to cover a case like this, where there was an entire want of jurisdiction to lay the assessment, or they would have made a similar provision in the seventh section to that made in the first section. In the first section the language used is, "or in case there shall have been a defect in authority, or want of authority, in the department or officer by whom any such contract shall have been made." The use of these words want of authority in the first section and their omission in the seventh can not be regarded as unintentional. In the first section it was intended to cover all cases, whether there was jurisdiction or not; in the seventh section it was not intended to cover cases where jurisdiction was wanting, and where assessments were invalid by reason of any "want of authority," to lay them.

II. The act of 1872 does not affect the remedy only, but affects a right of property, viz., the right of a citizen to hold his lands unincumbered by any cloud upon his title. (a) It must be conceded that if the act prevents the plaintiff from removing an incumbrance or cloud upon his title to lands, it affects his

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Respondent's points.

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right to a free and undisturbed ownership of them. The assessment in question is such a cloud (See *Crooke v. Andrews*, WOODRUFF, J., 40 *N. Y.* 550). There can be no question but that this interference with and impediment to the plaintiff's right and power to sell his land deprives him of his property (*Wynehamer v. People*, 13 *N. Y.* 396). It is manifest, that if section 7 of the act of 1872 deprives the plaintiff of all remedy against the cloud which the assessment casts upon his title under the provisions of the *Law of 1871*, it deprives him of his property, since that cloud prevents his right to the free and unincumbered possession of his land and the sale thereof. This right is itself property (*Green v. Biddle*, 8 *Wheat.* ; 5 *Curt.* 355). The construction given to section 7, violates the principles of law here declared, since it denies to the owner the right here to establish and recover that possession of his property to which he is entitled under the constitution, viz., possession unincumbered by any illegal cloud upon his title.

III. The legislature could not take from the superior court the power to remove a cloud upon the title of the plaintiff's land (*Const.* art. 6, § 12). (a) The constitution provides, "The superior court of the city of New York, the court of common pleas of the city and county of New York, the superior court of Buffalo and the city court of Brooklyn, are continued with the power and jurisdiction they now severally have, and such further civil and criminal jurisdiction as may be conferred by law." It can not be denied that at the date of the adoption of the above constitutional provision, the superior court, in the exercise of its equitable jurisdiction, could have removed the assessment in question, as a cloud upon the plaintiff's title.

*E. Delafeld Smith*, counsel to the corporation, and  
*William Barnes* of counsel for appellants.

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Opinion of the Court, by CURTIS, J.

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BY THE COURT.—CURTIS, J.—The plaintiff, in his complaint, prays that the entry in the list of assessments, confirmed by the supreme court, recorded in the comptroller's office, may be, so far as it affects his lots, canceled, and removed as a cloud upon his title, and that the assessment made upon his lots may be adjudged void, and that the defendants be restrained from collecting such assessment and from taking any proceedings therefor by sale or otherwise. The suit was commenced May 28, 1873. The assessment complained of was confirmed July 5, 1872.

The legislature, by an act passed May 7, 1872, ch. 580, relating to local improvements in the city of New York, sought to remove objections arising from defects in the proceedings imposing assessments for such local improvements, and at section 7 of the act enacts as follows :

“§ 7. No assessment heretofore made or imposed, or which shall hereafter be made or imposed, for any local improvement or other public work in the said city, already completed or now being made or performed, shall hereafter be vacated or set aside for or by reason of any omission to advertise, or irregularity in advertising any ordinance, resolution, notice, or other proceeding relative to or authorizing the improvement or work for which such assessment shall have been made or imposed, or for proposals to do the work, or for, or by reason of the omission of any officer to perform any duty imposed upon him, or for or by reason of any defect in the authority of any department or officer upon whose action the assessment shall in any manner or to any extent depend ; or for or by reason of any omission to comply with or carry out any detail of any law or ordinance ; or for or by reason of any irregularity or technicality, except only in cases in which fraud shall be shown, and in cases of assessments for repairing any street or public place, upon

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Opinion of the Court, by CURTIS, J.

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property for which an assessment has once been paid for paving the same street or public place ; and all property in said city benefited by any improvement or other public work already completed or now being made or performed, except as aforesaid, shall be liable to assessment for such improvement or work ; and all assessments for any such improvement or other public work shall be valid and binding, notwithstanding any such omission, irregularity, defect in authority, or technicality."

The question arises as to what is the effect of this section 7 of the act of 1872, upon the power of the court to grant the relief sought by the complaint.

It has been held in *Lennon v. Mayor, &c. of New York* (55 N. Y. 361), that this enactment is not confined to abrogating the summary remedy afforded by the act of 1858, ch. 338, to vacate assessments, for irregularity, &c., but that it is a general prohibition applying not only to special proceedings, but to all suits commenced after January 1, 1872, and that it deprives the court of the power to grant the relief demanded in the complaint, viz. : that the assessment be declared void, and be canceled of record, and the defendants enjoined from collecting it. It appears to have been also held that this act of the legislature to deprive the courts of the power to give this relief, and the parties the benefit of this form of remedy, was constitutional and valid, and that although inconvenient to an owner to have an apparent lien upon his land, yet that he had no such constitutional right to the aid of a court of equity to remove such cloud upon his title, that the legislature might not deprive him of that particular remedy ; but the court discriminatingly hold that if the assessment has not been effectually validated by this act of 1872, then the owner is protected by the constitution in resisting the taking of his property, or the

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Opinion of the Court, by CURTIS, J.

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title of any purchaser who may claim by virtue of a sale had under it, or its collection.

This construction in *Lennon v. Mayor, &c. of New York* (55 *N. Y.* 361), of the effect of section 7 of the act of 1872, upon the power of the court to grant the identical relief sought by the present plaintiff in his complaint, would seem to dispose of this action, unless there is something to remove it beyond the scope of that adjudication, so that the court may have power to grant the plaintiff the benefit of this form of remedy. It is true the court of appeals in *Lennon v. Mayor* (55 *N. Y.* 367), sustained the complaint so far as it sought to restrain the execution of the lease in pursuance of a sale, but this was on the ground that the act of 1872 did not purport to give validity to sales made prior to its passage under void assessments, nor could it have that effect; but in the present case there has been no sale or attempt to sell prior to the act of 1872.

The legislature, by an act passed May 2, 1874, have still further extended the provisions of section 7 of the act of 1872.

There has been no repeal of the act thus held to affect the powers of the court to grant the initiative relief sought in this action.

It is claimed on behalf of the plaintiff, that section 7 of the act of 1872 is an attempt on the part of the legislature, to interfere with the judicial department, and with the rights of citizens to be protected by the courts, and ought to be strictly construed, and that this statute applies to mere matters of detail or regularity, not affecting any substantial right, and that the failure to post notices in hand-bills, was an omission of one of the requisites for effecting service of process, and that this omission of itself was sufficient to take the case out of the act of 1872, and that the effect of the various omissions was to render the proceeding substantially one that was analogous to a judicial proceeding conducted



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without service of process. The plaintiff further claims that the act of 1872 did not deprive the court of jurisdiction to relieve against an assessment imposed by commissioners who had no power to make it, and confirmed by a court having no jurisdiction, over either the proceedings, the persons, or the land assessed, by reason of fatal errors jurisdictional in character.

An assessment is but a mode of taxation within the scope of the legislative power, and is subject to be controlled by legislative action the same as any other taxation. The responsibility for it rests with the legislature and not with the courts. If it is oppressive, the people, who through their representatives impose it, control the remedy (*People ex rel. Griffin v. Mayor of Brooklyn*, 4 *Com.* 425).

It hardly seems to have been ever contemplated by the legislature, that parties upon whom any form of taxes may be imposed, shall have their liability affected by nice jurisdictional questions in respect to whether there has been a due service of notice in the nature of process upon them. To require this in all cases, might impose a burden and create exemptions, seriously militating with the public interest. But the plaintiff, even if the question as to notice to him was serious, must be regarded as having waived it by appearing and objecting to the assessment, and being heard.

In the verified objections presented by the plaintiff, it is claimed that the assessment laid on his property is too much. He does not contend but that he ought to pay some equivalent for the benefit conferred upon his property by the local improvement of Broadway. But the plaintiff by this action in effect seeks to escape all payment for this benefit to his individual property, and that the expense of it as far as he is concerned, shall be thrown upon the city at large.

It appears that most of the other owners of prop-

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erty, that have been assessed for the benefit of this local improvement, have paid their assessments. The plaintiff's suit in equity to be relieved of any payment of the assessment for the benefit, is one of a class of proceedings that the legislature may have conceived to be inequitable, and to have led to the abrogation of the remedy in equity as far as lay in their power, which is, of course, limited by the constitution.

It is shown that there were meetings of the commissioners at which not more than two of their number were in attendance. There was a majority report and a minority report, that brought before the court for consideration and confirmation, the respective views and conclusions of the three commissioners, who thus all three reported to the court, that could in its discretion act upon the views indicated. The determination of the supreme court at special term was reviewed by the general term, upon appeal, and affirmed.

It is not easy to say, in view of the act of 1872, and of the plaintiff's appearing and course in the assessment proceedings, that there were errors now fatal to the assessment. Nor is it necessary to determine the questions, whether this assessment was void, or, if void, whether it was made valid by the acts of 1872, and 1874, or either of them. Looking at it from the plaintiff's position, and conceding that it is, for the reasons claimed on his part, an abortive attempt to impose an assessment, it appears to come within the views expressed by RAPALLO, J., in *Lennon v. Mayor* (55 N. Y. 366), in rendering the opinion of the court, that such an attempt and the outstanding record of it, does not deprive a plaintiff of his property, although the apparent lien on his land may be inconvenient to him, and that he has no such constitutional right to the aid of a court of equity to remove such cloud, that the legislature may not deprive him of this particular remedy, and that the legislature has deprived the courts

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Opinion of the Court, by CURTIS, J.

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of the power to give him the benefit of this remedy, and remitted him to the relief in which he is protected by the constitution when the pretended lien is sought to be enforced by the taking of his property, or to resisting its collection, or the title of any purchaser who may claim under it.

As yet no distinct step or action appears to have been taken in respect to collecting this assessment, except the entering of it in the office of the city comptroller among the entries of assessments confirmed, which is simply the outstanding record of it.

The pleadings and the evidence fail to show any other definite act than this in reference to it, so that this suit, on the part of the plaintiff, would seem to be premature at least, and no case shown entitling the plaintiff to the relief sought, unless some action has been taken that places it out of the ruling in *Lennon v. Mayor* (55 *N. Y.* 367), which remits him to assert rights secured by the constitution; and this seems to have been the view of the learned judge at special term, who also deemed that the plaintiff was entitled in this action to assert such rights in consequence of an admission on the part of the defendant at the trial hereafter referred to.

It will be seen that the complaint alleges that the list of assessment as confirmed, has been recorded in the comptroller's office, and that it is a lien and cloud upon plaintiff's title, "and that the defendants are proceeding to collect" the same.

The answer in substance sets up that the assessment has been duly entered in the record of the comptroller's office, and is a valid lien on the plaintiff's title, and that it is the defendant's duty to take proceedings for its collection, if it is not paid in conformity with the statutes; and by a general denial of all allegations in the complaint, not specifically admitted or denied, it puts in issue the plaintiff's allegation that the defend-

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ants "are proceeding to collect" the same. There appears to have been no evidence of any such proceedings.

The defendants' counsel admitted, on the trial, "that proceedings have been taken *towards* its collection."

This is a vague admission, that does not disclose a solitary act upon which a court of equity can exercise its discretion in granting an injunction or other equitable relief. It seems intended by implication to convey the idea to the court, that the plaintiff's land has been advertised for sale, or that it has been sold, or that a lease is about to issue, in pursuance of *Laws of 1871, ch. 381*. But it is difficult to infer any of these acts, especially as the three years after confirmation of the assessment that must elapse before the comptroller can advertise the land for sale for non-payment of the assessment, had not expired when the suit was commenced.

A court is not called upon to grope in obscurity to find or to infer inequitable acts, or acts to be resisted where the case fails to show them. Looking carefully at the language of the pleadings and the admissions by the defendants, it seems that what are termed proceedings "towards" the collection of the assessment in the admission made by the defendants, in reality consist in the entry of the assessment in the office of the comptroller of the city among the entries of assessments confirmed, which is the only actual proceeding shown to have been taken in respect to it, prior to the commencement of this action, and which, at most, constitutes simply the making of an "outstanding record" of it.

This leaves the case one that is governed by the decision in the court of appeals referred to, where the right to the remedy sought, in the present form, and under the existing circumstances by the plaintiff, appears to have been carefully considered and deemed to have been abrogated as to this class of suits and proceedings commenced after January 1, 1872.

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Statement of the Case.

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The judgment appealed from should be reversed (and judgment absolute for the defendants), with costs.

MONELL, Ch. J., concurred.

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SIDNEY DILLON, *et al.*, PLAINTIFFS AND APPELLANTS, v. JOHN S. MASTERTON, DEFENDANT AND RESPONDENT.

In a contract for work and labor, where there is a provision that the work should be completed by a certain date, and be paid for *upon completion*, and such work is not completed at the time limited for its performance, but is proceeded with afterwards, with the assent of the party for whom the work is being done, a recovery may be had for the work done according to the rate of compensation fixed by the contract.

In such a case "time is *not* deemed to be of the essence of the contract."

When "time is of the essence of the contract," it must be made to appear so in express terms, and not be left for inference or presumption from doubtful expressions therein.

In the case at bar, if the work had not been completed at the time specified, the party for whom it was to be done could have rescinded the contract at that time, and the other party could not have recovered for the work done.

If the party did not rescind, but allowed the work to go on, he must pay for the same at the rates specified in the contract, and if he required it to be completed within a reasonable time, he must give the other party notice thereof, before he can terminate the same.

Present, FREEDMAN, CURTIS and SPEIR, JJ.

*Decided February 1, 1875.*

This is an appeal by the plaintiffs from a judgment

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Statement of the Case.

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entered upon the report of a referee dismissing the complaint.

The action is to recover for labor and materials.

The defense is a general denial, and a counter-claim is interposed, claiming damages for the default of the plaintiff.

On February 13, 1873, the plaintiffs contracted, in writing, to furnish the materials and complete the filling of a certain portion of Seventy-sixth-street, and to complete the work by June 1st following, and the defendant agreed that upon completion of the work, he would pay the plaintiff twenty cents per cubic yard for the material furnished and used.

The plaintiff failed to complete the work at the time specified. The defendant did not then terminate the agreement, but from time to time he called on the plaintiffs to proceed with it, which they did to some extent. Subsequently, by a notice, dated December 27, 1873, and served on the plaintiffs, about that time the defendant terminated the contract, and the plaintiffs ceased work.

The plaintiffs had furnished and filled in twenty thousand one hundred and seventeen  $\frac{10}{100}$  cubic yards of materials, and this action is to recover for the same at the contract price of twenty cents per yard, amounting to four thousand and twenty-three dollars and forty-four cents.

The referee finds that the plaintiffs furnished materials and did work under the contract after June 1, 1873, at the request and direction of the defendant, and resumed work in pursuance of the contract from time to time, at the request and direction of the defendant, up to about December 25, 1873.

The view taken by the referee in dismissing the complaint was, that by the contract performance was to precede payment, and the plaintiffs having failed to perform on their part without fault on part of defend-

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Opinion of the Court, by CURTIS, J.

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ant, can recover nothing for the labor and materials furnished.

The referee also held that the defendant was not entitled to damages for delay, other than a dismissal of the complaint, and judgment in his favor for costs.

*Alex. Thain*, for appellants.

*Samuel Hirsch*, for respondents.

BY THE COURT.—CURTIS, J.—It is not a condition of the contract, that there shall be no money paid for the work, unless it is done at the time fixed. The contract provides that the work is to be paid for upon completion. The referee finds that the defendant was to pay on the completion of the work at the time specified. If it had been the design of the parties to bind themselves to the stringent condition expressed by the words “at the time specified,” it must be presumed they would have inserted it in the contract, and the finding of the referee that there was such a condition would then be sustained. In its absence, such a condition can not be assumed as a part of the agreement. When time is of the essence of a contract, it must be made to appear in express terms, and not left to be inferred from doubtful expressions.

It seems to be well settled, that where work done under a contract, is not completed at the time limited for its performance, but is proceeded with thereafter with the assent of the party for whom the work is done, a recovery may be had for the work done, but the plaintiff is confined to the rate of compensation fixed by the contract, unless during the progress of the work he gives notice of an intention to demand a different rate of compensation.

It was the right of the defendant to rescind the contract upon the failure to complete, and if he had done

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Opinion of the Court, by CURTIS, J.

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so, the plaintiff could not have recovered. But the defendant thereupon elected not to do so, and then, not only suffered the plaintiffs to go on, but repeatedly urged and directed them to proceed with the work, thus both parties, after the time expired, treated the contract as still in force.

If the defendant had wished to annul the rights of the plaintiffs under the contract, he should upon their failure to complete at the day designated, have given them a notice requiring performance within some reasonable time specified, and that in case of default, their rights would be deemed abandoned (*Merrill v. Ithaca & O. R. R. Co.*, 16 *Wend.* 588; *Sinclair v. Tallmadge*, 35 *Barb.* 802; *Myers v. De Mier*, 52 *N. Y.* 647; *Hubbell v. Von Schöning*, 4 *Supr. Ct.* 649).

The plaintiff's action for the price should have been sustained, leaving the defendant to his remedy for any injury he may have suffered by the plaintiff's delay in completing the work. The finding of the referee as to the damage sustained by the defendant is rather vague as to the amount, and not supported by the evidence with satisfactory clearness.

These views, if they are correct, dispose of the principal questions raised by the appeal, and the judgment appealed from should be reversed, with costs to appellants, to abide the event of the suit, and with the usual order in respect to the order of reference, and a new trial ordered.

FREEDMAN and SPEIR, JJ., concurred.

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CASES ARGUED AND DETERMINED  
IN THE  
SUPERIOR COURT  
OF THE  
CITY OF NEW YORK  
AT GENERAL TERM.

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JOHN E. RISLEY, PLAINTIFF, v. WILLIAM H.  
SMITH AND OTHERS, DEFENDANTS.

I. EQUITABLE ASSIGNMENT.—EXECUTORY CONTRACTS  
TO ASSIGN.

1. WHAT WILL OPERATE AS.

- a. An order to pay a part of a fund not in existence will, upon the fund coming into existence, *operate as an equitable assignment*; but if the fund never comes into existence, the order can only *operate as an executory contract to assign*, a breach of which may give a right to damages.

BUT

to give validity to the order either as an equitable assignment or an executory contract a *consideration is necessary*.

2. CONSIDERATION, WHAT NOT SUFFICIENT.

- a. *Husband and wife*. An antecedent indebtedness due by the husband of the drawer of an order payable out of a specified fund to grow due, is not a sufficient consideration.

*This though the order is accepted by the drawee—*

See *Alger v. Scott*, 54 N. Y. 14.

- b. *An illusion without substance or value is not sufficient*.

*Instances given.*

- a. *A promise by the drawee to pay to the drawer, if the promis*

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Statement of the Case.

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is such that the promisee will never have the use, benefit, or enjoyment of any thing is not sufficient.

1. *It is a mere illusion.*

d. *Forbearance does not form a consideration.*

1. Where, *although* a security is taken which does not become payable until the expiration of some term yet to elapse, *but the actual intention* of the parties, had no reference to relieving the principal debtor from an action by his creditor.

2. Where the forbearance is not promised or given *at the request of the promisor.*

a. If a promisee gratuitously or voluntarily, or at the request of a third person, promises or gives forbearance, that can not sustain a contract which had no reference to forbearance.

## II. APPLICATION OF ABOVE PRINCIPLES.

1. A., as agent for a railroad company, procured B. to propose to enter into a contract for the building of the company's road for a certain sum, to wit, two hundred and fifty thousand dollars. At a conversation between A., B., and the president of the company the subject of A.'s compensation came up, and it was agreed between them that he ought to have five thousand dollars; as the sum to be paid for building the road would exhaust all the available assets of the company, the president asked B. to pay the five thousand dollars. To this B. objected, but the final result was that it was arranged that the five thousand dollars should be added to the contract price for building the road, and that B. should give A. a draft on the railroad company for five thousand dollars payable *pro rata* as the money should become due to B. under his contract with the company. Thereupon the company and B. entered into a contract whereby B. agreed to construct the road and to run or procure cars to run thereon, and the company covenanted that when B. should complete the road all the franchises, rights, and property of and belonging to the company should become the property of B. and his associates, and further covenanted to pay B., on such completion, two hundred and fifty-five thousand dollars in certain specified installments. At the time of the execution of this contract B. gave to A. the order before mentioned, which was then and there accepted by the president on behalf of the company.

There was some evidence that before the arrangement for the order was consummated, the president said that he could possibly get additional subscriptions to the extent of five thousand dollars,

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if B. would consent to take that amount for the benefit of him (the president) and A. Afterwards the agreement to construct the road was, by the mutual consent of the parties thereto, canceled and annulled before any sum became due B. thereunder. A. demanded payment from B. and the company, which, being refused, he brought an action against B. on the order.

HELD,

upon these facts that there was *no sufficient consideration* to hold B. liable.

Before MONELL, Ch. J., SEDGWICK, and SPEIR, JJ.

*Decided February 1, 1875.* •

Verdict for plaintiff, and exception ordered to be heard in the first instance at general term.

The complaint averred that a contract was entered into by the defendants and an Indiana Railroad Company, by which the former agreed to construct for the latter its road, for certain moneys to be paid by the latter from time to time.

That afterwards, while the contract was in force, the defendants, for a valuable consideration, drew a written draft or order on the company, directed to its president, in the words following, viz.:

“NEW YORK, July 13, 1867.

“\$5,000.

“For value received pay to the order of John E. Risley, five thousand dollars *pro rata*, as the money shall become due to us under our contract with you of this date, and charge the same to the account of

“Yours Truly,

“W. H. SMITH,

“CHARLES KING,

“CONDE R. ALTON.

“To *S. C. Willson*, as President of the Indianapolis, &c. Railroad Company.”

That afterwards, on the day of the date of the draft, the plaintiff presented the same to the said *S. C. Willson*, as president, &c., and Willson, on behalf of the

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company, accepted the draft by writing thereon, "Accepted, July 13, 1867, S. C. Willson as President of Indianapolis, &c., Railroad Company."

That afterwards, to wit., &c., the defendants and said railroad company, without the knowledge or consent of plaintiffs, and after defendants had begun to construct the road under the contract, and before any moneys had become due under it, canceled said contract.

That no part of the moneys due under said draft to the plaintiff, had ever been paid, although payment of the same had been demanded, both of said defendants and of said company.

The complaint demanded judgment in five thousand dollars, with interest from July 13, 1867.

The answer admitted the making of the contract.

It denied that the defendants made the draft set out in the complaint for a valuable or any compensation, and alleged that without any consideration and at the request of the plaintiff, and of the said Willson, president, they drew said order to enable said Willson and said plaintiff to receive and collect from the company five thousand dollars, to cover what the plaintiff and Willson claimed to have been their labor and services, rendered to the company in carrying through the negotiation of the contract for building said road, and for that and for no other purpose, the said sum of five thousand dollars was agreed to be and was added to the contract price of two hundred and fifty thousand dollars, on which the company and the defendants had previously agreed, and the said order was drawn by the defendant, and accepted by the said Willson, as president of said company, accordingly.

That at the time said draft was drawn it was mutually understood that the ability of the defendants to execute their said contract with said company, and the receipt of said five thousand dollars by said plaintiff and

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Willson out of the proceeds of said contract, must and should depend and be contingent upon the defendants receiving funds necessary to carry out their contract, which they did not possess themselves, from other parties, upon whom they relied for that purpose, and that with such understanding these defendants drew, the plaintiff received, and the said Willson, as president, &c., accepted said draft.

That in fact the defendants, notwithstanding their best efforts, failed to secure the necessary funds to carry out said contract, and thereupon the said contract was with the express assent of said Willson, and as these defendants were informed and believed, with the knowledge and assent of the plaintiff, canceled on the ground of the inability of the defendant to carry out the same.

The answer, for a separate defense, alleged that said Willson was a necessary party plaintiff, because it was agreed between the plaintiff and Willson that the said five thousand dollars, if realized, should be divided between the plaintiff and Willson, for services alleged to have been rendered by them jointly for the said company, in procuring the defendants to enter into said contract.

Upon the trial it appeared, by the plaintiff's case, that the plaintiff on behalf of the Indiana Railroad Company, found the defendants and brought them into communication with Willson, president of the company. It was preliminarily and informally agreed between them, that the defendants would contract to build the road of the company for two hundred and fifty thousand dollars. There was then a conversation between the plaintiff, Willson and the defendants, in regard to compensating the plaintiff. It was agreed between them that the plaintiff ought to have five thousand dollars, and Willson suggested that as by the proposed contract the company was to give to the

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Statement of the Case.

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defendants all of its available assets, there would be no provision for paying the plaintiff, and asked that the defendants themselves pay it, to which the defendants made some objection. The final result was, that the defendants offered, if the railway company would increase the bonus five thousand dollars, from two hundred and fifty thousand dollars to two hundred and fifty-five thousand dollars, they would then give the plaintiff the draft in suit. The defendants agreed to draw the draft, provided that was done. Thereupon an agreement was made, July 13, 1867, between the defendants and the railroad company, by which the defendants covenanted to construct the road, and to run or procure cars to be run thereon; and the railroad company covenanted that when the defendants should complete said railroad, all the franchises, rights and property of, and belonging to the company, should become the property of the defendants and their associates. The company further covenanted to pay the defendants in the aggregate, two hundred and fifty-five thousand dollars, but in installments, specified as the work went on. The agreement was executed on behalf of the company by Willson as president of it. At the same time, the draft or order in suit was drawn and accepted. After the plaintiff had the order, Willson suggested that he had been at great expense and trouble, but the company had no means to reimburse him, and said the plaintiff ought to give him part of the money after he had collected it. The plaintiff said, as matter of grace and nothing more, he would give Willson, one-third or one-fourth of the money, after it was collected. On April, 16, 1868, by the mutual consent of the parties to the agreement to construct the road, it was canceled and annulled between them, before any sum became due to the defendants thereunder. The plaintiff had demanded payment, both of the defendants and the railroad company, but this was refused

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Statement of the Case.

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The defendants moved to dismiss the complaint on the ground that the testimony showed no liability of the defendants. The motion was denied, and the defendants excepted.

On the part of the defendants, Mr. Nelson testified that he introduced the plaintiff to the defendants, at the beginning of the negotiation ; that Willson, for the company, offered the defendants two hundred and fifty thousand dollars ; that there was a proposition to allow the plaintiff something out of this, but the defendants said they could not spare it ; that Willson said he would go home and see if he could not get five thousand dollars subscribed in addition ; that Willson said he wanted a portion of this, and the plaintiff was to take care of Willson.

The defendant Alton testified that Willson stated that he possibly could increase the amount five thousand dollars, if the defendants would consent to take that amount for the benefit of himself and the plaintiff, as the witness understood, and upon that the proposition was drawn up and executed with the amount at two hundred and fifty-five thousand dollars, on the understanding that five thousand dollars was to be applied to the compensation of plaintiff and Willson. The fund was to be held by the plaintiff, and Willson was to derive a benefit from it. The witness was asked by defendant's counsel, "Q. Why did you not go on and build the road?" Upon objection, defendants offered to show that they did not go on to build the road, because of their inability, and that the contract was surrendered and canceled solely on this ground. The question was shut out and the offer rejected, to which the defendants duly excepted.

The defendants renewed the motion to dismiss the complaint or to direct a verdict for the defendants on the ground that there was no liability upon the testi-

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Plaintiff's points.

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mony shown of these defendants. This was denied, and exception taken.

The defendants' counsel asked the court to submit to the jury the following propositions, among others :

If the jury find that the draft was given to the plaintiff to enable him to collect from the company money due him from the company, and not as an evidence of indebtedness from the defendants to the plaintiff, they should find for the defendants.

If the jury find that the draft was given in the form of a draft for the plaintiff's convenience to enable him to collect the money from the company, the plaintiff can not recover. The requests were denied, to which the defendants duly excepted.

The court directed a verdict for the plaintiff, to which exception was taken, and further directed the exceptions to be heard before the general term in the first instance, judgment in the meanwhile to be suspended.

*John E. Risley*, plaintiff, in person, and *James Clark*, counsel, on the points considered by the court, urged ;—I. The draft in question was drawn and delivered by defendants for a sufficient consideration. (1) It purports, by its terms, to be drawn "for value received." These words afford *prima facie* evidence of a valid consideration, and cast on defendants the burden of proving that there was no consideration (*Jerome v. Whitney*, 7 *Johns.* 321 ; *Hinman v. Moulton*, 14 *Id.* 466 ; *Jackson v. Alexander*, 3 *Id.* 484 ; *Walrad v. Petrie*, 4 *Wend.* 576 ; *Prindle v. Caruthers*, 15 *N. Y.* 425, 431). (2) The five thousand dollars added to the bonus agreed to be paid to defendants, constituted a valid and valuable consideration for the drawing and delivery of the draft to the plaintiff. (a) One promise is a good consideration for another (1 *Pars. on Cont.* 448 ; *Miller v. Drake*, 1 *Caines*, 45, 46 ; *Briggs v.*



## Plaintiff's points.

Tillotson, 8 *Johns.* 235; N. Y. & N. H. R. R. Co. v. Pixley, 19 *Barb.* 428; White v. Demilt, 2 *Hall*, 436; Funk v. Hough, 29 *Ill.* 145; Downy v. Hinchman, 25 *Ind.* 453; Nunally v. White, 3 *Metc. (Ky.)* 584; Babcock v. Wilson, 17 *Me.* 372; Whitehead v. Potter, 4 *Ired. L.* 257; Appleton v. Chase, 19 *Me.* 74; Society in Troy v. Perry, 6 *N. H.* 164; George v. Harris, 4 *Id.* 533; Forney v. Shipp, 4 *Jones (N. C.)* 527; Nott v. Johnson, 7 *Ohio St.* 270; Abrams v. Suttles, *Busbee (N. C.)* 99. (b) The promise of the railroad company to pay the defendants the additional five thousand dollars afforded a valid consideration for the obligation incurred by them in drawing and delivering the draft to the plaintiff. It is not necessary that the consideration of a promise should move from the promisee to the promisor. It is sufficient that it proceed from a third party—especially, to use the language of some of the authorities, if the promisee have “intervened in the agreement” (1 *Smith Lead Cas.* 224; 1 *Story on Cont.* §§ 450, 451 b.; Farley v. Cleveland, 4 *Cow.* 432; Barker v. Bucklin, 2 *Den.* 45; Stewart v. Trustees of Ham. Col., *Id.* 403, 417; Del. & Hud. Canal Co. v. Westchester Bank, 4 *Den.* 97; Tipper v. Bicknell, 3 *Bing. (N. C.)* 710, Webb v. Rhodes, *Id.* 732; Arnold v. Lyman, 17 *Mass.* 400; Carnegie v. Morrison, 2 *Metc. (Mass.)* 381). (3) The company's obligation to pay the plaintiff for his services, prior to the drawing and acceptance of the draft, was absolute and present. On the faith of the draft plaintiff accepted, instead of an absolute, a conditional liability of the company, and consented to receive his pay in future installments instead of *in presenti*. Each of these concessions afforded a valid consideration for the obligation assumed by defendants in drawing and delivering the draft.

II. Through the drawing and delivery of the draft by defendants, and its written acceptance by the rail-

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Plaintiff's points.

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road company, plaintiff became the equitable assignee of an interest in the contract between defendants and the company, and entitled to five thousand dollars of the money to be paid pursuant thereto (*Vreeland v. Blunt*, 6 *Barb.* 182; *Peyton v. Hallett*, 1 *Caines*, 364. 379; *McMenomy v. Townsend*, 3 *Johns.* 72; *Bradley v. Root*, 5 *Paige*, 632; *Ward v. Whitney*, 8 *N. Y.* 442).

III. The draft having been drawn and delivered for a sufficient consideration, and the plaintiff having become the assignee of an interest, equal to the face of the draft, in the contract between the company and defendants, the latter became bound to perform the contract for the benefit of the plaintiff; and their subsequent surrender of it, without the plaintiff's consent, was a breach of their obligation to him, rendering them liable for the amount secured by the draft. The true principle is laid down in the case of *Worden v. Dodge*, 4 *Den.* 159. The action was on an agreement by which the defendants agreed to pay the plaintiff a specific sum out of the net proceeds of a certain ore bed. The plaintiff read the agreement and rested; whereon defendants moved for a nonsuit. The judge granted the motion, holding that the "plaintiff could not recover without proving that the defendants had received funds from the ore to enable them to pay, or had neglected to work the ore bed." The obligation of the makers of the contract in that case to work the ore bed, and that of the drawers of the draft in this to construct the road, stand on exactly the same footing.

IV. There was no error in the court's rejection of defendants' offer to show "that they did not go on to build the road in accordance with the terms of the contract, because of their inability to do it, and that the contract was surrendered, and the surrender accepted by the company on that ground." If, by drawing and delivering the draft, defendants incurred the obligation

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Defendants' points.

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claimed by the plaintiff, their subsequent embarrassments furnished no better answer to his demand than the insolvency of the maker of a promissory note would to an action against him by the holder. "*Nulla bona*," however complete a defense to an execution, has never been regarded as a good plea in bar before judgment. Defendants' offer, however, is significant in one respect: it is a distinct admission, on the record, that the surrender and cancellation of the contract between them and the company was for a reason wholly different from the alleged fraud in which they now accuse themselves of having participated, and which, they insist vitiated both the contract and the draft.

*Rodman & Adams*, attorneys, and *S. P. Nash*, of counsel for defendants, on the points considered by the court, urged ;—I. Unless the order signed by the defendants amounted, in legal effect, to an undertaking with the plaintiff to go on with the contract with the railroad company, so as to earn the money out of which the order was payable, the defendants incurred no liability to plaintiff by surrendering the contract. (1) An order payable in a particular manner out of a particular fund is not a bill of exchange, and is not subject to the law merchant (*Cook v. Satterlee*, 6 *Cow.* 108; *Morton v. Nayler*, 1 *Hill*, 583; *Van Wagner v. Terrett*, 27 *Barb.* 181). (2) An order drawn, not against funds in hand, but made payable out of funds expected at a future day, does not *per se* guarantee that such funds will come to hand. (3) The legal import of the draft in suit was this: "We expect to earn two hundred and fifty-five thousand dollars agreed to be paid to us by the railroad company. If we do, we will pay you five thousand dollars out of it, and you may collect it of the company as earned, and before it is paid over to us." No obligation was assumed to earn it or to pay, in default of earning it (*Churchward*

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Defendants' points.

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v. Regina, *Law Rep.* 1 Q. B. 173). (4) Considered as an assignment of interest of five thousand dollars in the contract, it created no obligation on the part of the defendants, as assignors, to earn the money. Their only duty to the plaintiff was, in case the money was earned, not to prevent his obtaining it. A warranty of title is implied in a sale of personal property; and in the sale of a chose in action, a warranty is sometimes implied that the amount due is that called for by the security; but this implied warranty is "founded on the presumed superior knowledge of the vendor on the subject" (*Furniss v. Ferguson*, 15 N. Y. 437· 34 *Id.* 485; 3 *Robt.* 269). But a warranty applies to an existing state of facts, not to expectations; and in the case at bar, if there was any superior knowledge in either party, as to the facts relating to the contract, it was in the plaintiff.

II. If the giving of the order did not imply an undertaking at all events to fulfill the contract or pay the five thousand dollars, then a surrender of the contract, if made in good faith, was no more a violation of duty to the plaintiff than a non-performance of the contract through mere inability of the contractor.

III. If the order implies an absolute undertaking on the part of the defendants to the plaintiff, to perform the contract, or to pay to him the sum expressed in the order, such an undertaking was without consideration. (1) When the order was given, defendants owed the plaintiff nothing. He had been employed, not by them, but by the railroad company through Willson, though he "had commenced as a volunteer to look for contractors, as he had an interest in lands along the line." This is his own statement. (2) The contract between the defendants and the company was to build the road for two hundred and fifty thousand dollars. It was increased to two hundred and fifty-five thousand dollars, not to benefit the defendants

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Opinion of the Court, by SEDGWICK, J.

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but the plaintiff, and the extra five thousand dollars was transferred to plaintiff as soon as the contract was made. There was no advantage to defendants in this ; no discharge or modification of any obligation on their part, as they were under none ; no increase in the amount of their compensation, as the nominal increase was at once transferred to plaintiff, and was never even to come into their hands. If the contract price was increased, they were to draw the order in question, that is, were to assign the full amount of the increase. This is plaintiff's own version of the arrangement. The exception to the refusal to instruct the jury, was well taken.

BY THE COURT.—SEDGWICK, J.—In *Alger v. Scott*, 54 N. Y. 14, the commission of appeals held, that an order to pay out of a specified fund, viz., rent to grow due from the drawee to the drawer, such order being accepted, did not in the absence of a consideration, make the payee of the order, an equitable assignee of the rent, it having fallen due ; and that the order being given to secure an antecedent indebtedness due by the husband of the drawer to the payee, was not sufficient consideration. Commissioner EARLE dissented. We are not in this case called on to consider what the rights of the payee are, when from the face of equitable principles, it is deemed there has been a grant, or executed transfer, of the right to the fund, by the former owner. But there can hardly be a doubt, that when the assignment has not been made, but is executory, the payee's rights must depend upon the obligation legal or equitable, of the person sued, to complete the assignment. In this case we do not consider the obligations of the acceptor, for it is not made a defendant, but only of the drawers who are sued.

Such orders to pay a part of a fund, not in existence, have been held several times, to be assignments, al-

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Opinion of the Court, by SEDGWICK, J.

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though not accepted, upon the fund drawn on coming into existence. (*Field v. Mayor of N. Y.* 6 *N. Y.* 184. *Parker v. City of Syracuse*, 31 *Id.* 376. *Hall v. City of Buffalo*, 1 *Keyes*, 193. *Stover v. Eyclesheimer*, 3 *Id.* 620). In the first case cited, an instrument in the form of an assignment, was held to operate as an agreement by the assignor that the assignee should take and receive the fund, when it should come into existence. It was not indeed an assignment *in presenti*, and did not at the time it was made transfer the claim the assignee had against the defendant, but it created an equity which seized upon the moneys as they became due, and continued so to do, until the object of the agreement was accomplished.

If the fund never comes into existence, it is impossible that there should be an assignment, or transfer of it. Then at the best, the obligation, is in its nature, one of contract to make the assignment, and in case specific performance be impossible, a breach of the contract may give a right to damages.

In the present case, the order by its terms is not an agreement. If any agreement be implied (*Road v. Dawson*, 1 *Ves. Sen.* 332; 3 *Lead. Cas. in Eq.*; 2 *Spence Eq. Jur.* 855), it was that the defendant would transfer to the plaintiff, or put him in possession of, the fund described as one thereafter to arise from their performance of the contract to build the road. This being an executory contract, and nothing more, a consideration must be found to make the defendants liable in damages for not performing it. And the learned counsel for defendants assumed, that a consideration must be proven, and forcibly urged, that one fully appeared by the evidence.

The facts relevant to the issue of consideration were not the subject of conflict among the witnesses. It is not claimed by the plaintiff that the defendants were under any liability to the plaintiff, by reason of his

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Opinion of the Court, by SEDGWICK, J.

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procuring the contract to be made. Whatever he did was on the employment, and at the request, of the railroad company solely. Before the contract was entered into, the negotiations had fixed the sum to be paid to the defendant at two hundred and fifty thousand dollars. It was demanded that they should agree to pay the plaintiff, out of this sum, five thousand dollars for his services. They not being liable to the plaintiff, refused to agree to this. But on the promise to have the sum to be paid to them made, by the contract, two hundred and fifty-five thousand dollars, they agreed to give the order in question. The contract was made to pay the defendants two hundred and fifty-five thousand dollars, and they drew the order.

Whatever the circumstances are, a consideration to support a contract must be substantial. It must have value, although the quantity of the value need not be great, but may be small. If it be an illusion, making but a false appearance of value, it is not a valuable consideration. The naked fee of an owner, after his interest in the land has been sold under execution, will not be a consideration for a promise to pay so much money for it (*Van Alstyne v. Wemple*, 5 *Cow.* 162). A promise to release from a contract void by the statute is not a consideration (*Silvernail v. Cole*, 12 *Barb.* 685).

A promise to pay in the future, or to act in the future, may be a consideration, but because the consideration takes the shape of a promise, not the less must the promise be of value. A promise by a plaintiff to account to the defendant for the interest of a third person in an adventure, when at the time of the promise it was possible that such third person might have a balance due him, yet it did not appear that he had one in fact, is not a valuable consideration (*Powell v. Brown*, 3 *Johns.* 104). A promise to pay has value to the promisee from it being a means of obtaining the thing promised. If the promisee is to have the money

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Opinion of the Court, by SEDGWICK, J.

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as his own for a short time, it may be enough. On the other hand, if the promise is such that upon full performance the promisee will never have use, benefit, or enjoyment of anything, there is not even an appearance of value to him.

In the present case, we will suppose that the railroad company promised to pay the additional five thousand dollars, if the defendants would draw the order. We do not now examine the reality of this supposition, although it would appear that by the contract the whole two hundred and fifty-five thousand dollars was made a consideration for the defendant's promises to build the road. We will consider the facts as if the order and acceptance had been inserted in the contract, in terms expressive of the obligations of the parties, as we have, for the purpose of this case, supposed they exist upon the order in its detached state.

It would then have appeared that, coterminously with the promise of the railroad company to pay to the defendants the two hundred and fifty-five thousand dollars, the defendants promised the plaintiff and the railroad company to assign five thousand dollars of that sum to the plaintiff, and to accomplish that, divested themselves of all claim to demand the five thousand dollars of the company. There was no instant of time when the defendants would ~~have~~ use or enjoyment, either of the five thousand dollars, or of the promise to pay the five thousand dollars. Therefore such a promise was without value to them. At the same time (looking at the company as the acceptor of the order), the contract would have contained a promise by the company, that upon the defendants performing, the company would pay the five thousand dollars to the plaintiff, which reduced the amount promised to be paid to the defendants to two hundred and fifty thousand dollars.



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Opinion of the Court, by SEDGWICK, J.

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If such had not been the nature of the transaction, but the contract had contained an absolute promise to pay to the defendants two hundred and fifty-five thousand dollars in their own right, the defendants would have had a valuable interest in the five thousand dollars, as parcel of that sum. As the facts were, I am of opinion that the promise by the railroad company to increase the two hundred and fifty thousand dollars to two hundred and fifty-five thousand dollars, and the performance of that promise was not a valuable consideration to make the defendants liable upon the executory contract in question.

Again, was there an implied agreement by the plaintiff to forbear suing the railroad company for the value of his services, which made the executory contract, which we have supposed to exist in the case, an obligation upon the defendants as founded upon a consideration? There is no proof that the plaintiff made an express promise to forbear. If there were a promise it must be implied in, or inferred from, the fact that the order and acceptance matured in the future. It is not a necessary consequence, from giving collateral security, that there be forbearance upon the principal obligation. The surety, as such, may desire that the principal debtor be called upon to pay, and, if possible, compelled to pay, before he, the surety, shall be liable. At the most, there would be a presumption that the creditor took security to give the principal debtor ease in the present. This presumption would be explained, if the other facts showed a different intention.

In the present case, without going into a minute dissection of the testimony, it seems clear to me, that the actual intention of the parties had no reference to relieving the railroad company from an action by the plaintiff. The arrangement was one by which the railroad company should be put in funds sufficient to pay the plaintiff. The contract that was contemplated

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Opinion of the Court, by SEDGWICK, J.

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at first, for the building of the road for two hundred and fifty thousand dollars, left the company without money to pay the plaintiff. In order to get the money, the defendants, by a letter, required that two hundred and fifty-five thousand dollars should be paid. This demand led to the company acquiring in some way five thousand dollars more. The arrangement substantially had reference to this, and not to the time when the plaintiff should call on the company for payment of its indebtedness to him.

Beyond this, to uphold forbearance as a consideration, it must be part of the contract, as between the parties. The party to be held must have made the contract upon that consideration. To state it in another way, the forbearance must be promised or given at the request of the promisor. If the promisee, gratuitously or voluntarily, or at the request of a third person, promises or gives forbearance, that can not sustain a contract which had no reference to forbearance. In the present case, the facts show that if forbearance was given, the company did not ask time, nor was the order given to the plaintiff on that score. The sole object of the transaction being to get the company in funds, as a help both to the plaintiff and to the Railroad Company, it affirmatively appeared that the defendants did not request the forbearance, but the plaintiff voluntarily gave it, so far as the defendants were concerned. I do not think, therefore, that in this matter there is a consideration which holds the defendants to the performance of a contract.

The theory of the present action, in substance, holds the defendants to the payment of a debt due by the company. It might be questioned, whether the drawing of a non-negotiable order constitutes such a written promise to pay, that it is not invalid by the statute of frauds. This was not discussed on the argument, and is not passed upon here. For the reasons stated

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Statement of the Case.

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above, I am of opinion that the motion to dismiss the complaint should have been granted ; that the exception to the ruling in that respect should be sustained. The verdict should be set aside, and a new trial granted, with costs to defendants to abide event.

MONELL, CH. J., and SPEIR, J., concurred.

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JAMES MAHER, AN INFANT, &c., PLAINTIFF  
AND RESPONDENT, v. THE CENTRAL PARK,  
NORTH AND EAST RIVER RAILROAD  
COMPANY, DEFENDANTS AND APPELLANTS.

# I. CARRIER.—NEGLIGENCE.—PASSENGER CASE.

## 1. CONTRIBUTORY NEGLIGENCE BY PASSENGER, WHAT WILL NOT CONSTITUTE AS MATTER OF LAW.

### 1. *Front platform, entering car by.*

If the car is *at rest or on the point of rest* although some motion remains, the getting on by the *front* instead of the rear platform is *not*, as matter of law, *contributory negligence*.

a. If the evidence leaves it *uncertain as to whether the motion* was not so great as to make it unsafe for a man of common prudence to get on the car, the question should be *submitted to the jury*.

## 2. NEGLIGENCE BY CARRIERS, EVIDENCE OF.

1. The *hurrying up of the horses* while a passenger is in the act of getting on, and before he is fairly on, is evidence of negligence *to go to the jury*.

# II. TRIAL.

## 1. CHARGE OF THE JUDGE, CONSTRUCTION OF.

1. *The whole charge must be considered and applied to the facts of the case.*

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Opinion of the Court, by SEDGWICK, J.

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THUS:

where there was evidence that at the time a passenger was getting on a car by the front platform, the car was at rest or on the point of rest, and that the driver invited the passenger to get on by the front platform, and the court charged the jury that they should find for the defendant, unless the proof showed that the car was stopped or being stopped, and further charged that the front platform is a place of danger, and the occupation of it, or an attempt to get on by it is *prima facie* evidence of danger, *unless the passenger is invited so to do by a servant of the company,*

HELD,

that the *qualification* as to the invitation must be considered *as applied* to the case of a passenger attempting to get on while the car was at rest or on the point of rest.

a. In this aspect the charge was a *more favorable one to the carrier* than he had a right to ask for.

Before CURTIS and SEDGWICK, JJ.

*Decided February 9, 1875.*

Appeal from judgment.

The facts sufficiently appear in the opinion.

*Brown, Hall, & Vanderpoel*, attorneys, and *A. J. Vanderpoel*, of counsel, for appellant.

*George Owen*, attorney, and *John Graham*, of counsel, for respondent.

BY THE COURT.—SEDGWICK, J.—This action is for damages for injury to plaintiff, by negligence of defendants. The jury assessed the damages at five thousand eight hundred dollars. The plaintiff at the time of the accident was eleven years old, and one of his witnesses was ten years old. They were not incompetent to testify, and it was the duty of the jury to consider their testi-

mony, as they would that of more mature witnesses, and examine it, in view of all the circumstances of age, intelligence, motive, &c. The boys swore that the car was stopped, or being stopped, when the driver told them to jump on. The driver was on the front platform as they waited for the car to come up. The plaintiff stepped upon the first step of the platform. Before he had reached the second step, the driver hurried the horses. This gave a sudden motion to the car, which threw the plaintiff under the wheels.

If the car was at rest, or on the point of rest, although some motion remained, there was not so plain an appearance of danger to a person taking the front platform that it was, as a matter of law, contributory negligence not to take the rear platform. If the evidence left it uncertain whether the motion was not so great as to make it unsafe for a man of common prudence to get on the car, the question might be submitted to the jury. An accident of the kind in question was as likely, if the plaintiff had taken the rear platform, although the consequences might not have been so serious. In either case, it might be properly assumed by the passenger, that the driver would act with common prudence, so far as not to start the car until the passenger was safely in it. I therefore think that the motion to dismiss the complaint, on the ground that it appeared that the plaintiff was negligent, was correctly denied.

The hurrying-up of the horses, before the plaintiff was fairly on the car, was evidence of negligence on the part of the driver, which the court was right in submitting to the jury. The court charged that it was negligence in plaintiff to get on the front platform, without the car stopping, or being stopped, and further that it was negligence contributing to the accident, if the jury believed that the car was not stopped, and the boy undertook to get on there.

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Opinion of the Court, by SEDGWICK, J.

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The defendant's counsel requested the court to charge "that the front platform is a place of danger, and the occupation of the front platform, or an attempt to get on the front platform, is *prima facie* evidence of negligence on the part of the passengers." The court so charged, adding "unless the jury believe he was invited on by the servant of the company." If this was equivalent to the court saying that the plaintiff would not be guilty of contributory negligence, when the car was moving at a dangerous rate, if the driver asked or told the plaintiff to get on, and was to be taken apart from the rest of the charge, there would be doubt as to its correctness. But we should take it as part of the charge to be applied to the facts of the case on trial. The court gave it as law to the jury, that they should find for defendant, unless the proof showed that the car was stopped or being stopped, so that the part of the charge under consideration must be applied to such a case, and then the modification of the court was in favor of the defendants, because it called upon the plaintiff further to satisfy the jury, that the driver invited him to get on the front platform.

The injury the boy received was very painful, and left him maimed for life. We can not affirmatively find that the amount of the verdict was extravagant, or more than a compensation for the results of the accident.

Judgment should be affirmed, with costs.

CURTIS, J., concurred.

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Statement of the case.

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HENRY BREWSTER AND OTHERS, PLAINTIFFS  
and RESPONDENTS, v. JAMES M. TAYLOR,  
DEFENDANT and APPELLANT.

I. FRAUDS, STATUTE OF.—SALE OF GOODS OF OVER  
FIFTY DOLLARS IN VALUE.

ACCEPTANCE, WHAT NOT SUFFICIENT TO SATISFY THE STATUTE.

The defendant, desiring to purchase a wagon fitted with a pole, went to the plaintiff's establishment, and there saw a wagon fitted with shafts which would suit him if a pole was fitted to it. The price of the wagon as it stood was four hundred and seventy-five dollars. The defendant asked how much a pole would cost. Plaintiff answered forty dollars. Defendant said he would not give so much for a pole, that he had several poles, one of which he thought could be made to fit the wagon, and he wanted plaintiff to fit it to the wagon. Plaintiff said if it was possible to do so without going to very great expense, in fact, making almost a new pole, he would, without any extra expense, as far as the pole was concerned. Plaintiff sent for the pole and found that it could not be fitted to the wagon, and thereupon sent the wagon as it stood to McDonnell's stable where the defendant had directed it to be sent. Defendant was not consulted in relation to plaintiff's decision that the pole could not be fitted, nor did it appear from the evidence that he had notice of it, or consented to accept the wagon without the change,

HELD,

*no acceptance of the wagon as it stood, without having a pole fitted to it.*

Before FREEDMAN, CURTIS, and SPIER, JJ

*Decided February 1, 1875.*

This is an action to recover the price of a wagon alleged, in the complaint, to have been "*sold and de-*

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Statement of the Case.

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*livered*” by plaintiffs to the defendant for the agreed price of four hundred and seventy-five dollars.

The answer denied the sale and delivery of the wagon, and sets up a special agreement, that the plaintiffs, having the wagon on hand, which was for one horse and shafts, and the defendant requiring a wagon with a pole for two horses, agreed with plaintiffs that they would take a pole belonging to defendant, taken from another wagon, and fit it to the wagon in question for the four hundred and seventy-five dollars, and deliver it on May 19, 1873.

The plaintiffs received from the defendant said pole, and undertook to fit the same as they had agreed to do, provided the expense was not too great, but failed to fit the pole, and wrongfully and without authority sent the wagon in the condition it was in to the stable of one McDonnell, in Forty-first-street, where it was destroyed by fire without any fault or negligence of the defendant.

The contract was not in writing, and no part payment of the price was ever made.

The case was tried by a judge and a jury, and at the conclusion of the plaintiffs’ case a motion was made that the complaint be dismissed on the ground that the transaction proved by plaintiffs was void by the statute of frauds; that the proof did not show any delivery of the wagon; and that no receipt or acceptance of the property had been shown.

The court granted the motion, and directed a verdict for the defendant.

The plaintiffs excepted to the direction, and asked the court to go to the jury on the question of acceptance alone, which was denied.

A motion was subsequently made on the minutes of the court for a new trial, which motion was granted; and from the order entered on that motion this appeal is taken by the defendant.



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Statement of the Case.

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An opinion was delivered on the motion for a new trial by the judge before whom it was tried, which was as follows :

MONELL, Ch. J.—At the close of the plaintiffs' evidence, the defendant moved to dismiss the complaint, on the ground that the contract not being in writing, and being for the sale of property exceeding fifty dollars in value, was void.

But the plaintiffs claimed, that the evidence showed a sufficient delivery and *acceptance* of the property, to take the case out of the statute.

The Court held the contract to be void under the statute, upon the broad ground that the proof of acceptance was not sufficient.

It was assumed, however, that there was enough proof of a delivery at McDonnell's stable, the place of delivery designated by the defendant, and that the evidence in regard to the fitting of a pole to the wagon, was so far a separate matter as not to affect the question; and it was, therefore, further assumed, that the evidence established a completed sale, accompanied by an actual delivery at the place designated by the purchaser. But as, in the opinion of the Court, there was not sufficient evidence of an *acceptance* of the property by the defendant, the complaint was dismissed.

I am now satisfied that I was in error in the view I took of the question at the trial.

It was a completed sale. The parties had agreed upon all the terms of the sale, and nothing remained but to send the property to the place designated by the defendant.

Except for the question arising under the statute of frauds, the title to the property passed to the defendant, and it was at his risk (*Bradley v. Wheeler*, 4 *Robt.* 18; *S. C.*, 44 *N. Y.* 495).

The sale was completed and the property was deliv

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Statement of the Case.

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ered, and in legal effect, a delivery at the place designated was a delivery to the defendant in person.

It is stated, generally (*Story on Sales*, § 276), that so long as the contract of sale is, by its terms, subject to avoidance by either party ; or so long as either party has a claim upon the goods, as against the other ; or, the purchaser may object to the quality or quantity, &c., the mere delivery will not make the acceptance complete. But where none of them exist, and the sale is completed, and the subject-matter has come into the absolute possession of the purchaser, or of some person authorized finally to receive it from him, the acceptance is final, complete, and irrevocable.

In *Outwater v. Dodge* (8 *Wend.* 397), the Court say, it is not indispensable that there should be in all cases an actual manual delivery and acceptance. A virtual delivery and acceptance may, in some instances, be equally effectual, and the acceptance need not be by the vendee in person ; it may be by his agent, acting under a general or special authority.

When the defendant, upon inspection of the article, agreed to the price, and said he would take it, it was an acceptance then and there, and as much so, as if he had then manually removed the property. The subsequent delivery to the agent of the defendant, was no necessary part of the sale, and did not affect the previous acceptance of the property.

In *Cross v. O'Donnell* (44 *N. Y.* 661), the Court say, there is nothing in the statute which requires that the acceptance and receiving shall be at the same time. Either may precede the other ; and after both have concurred, the contract becomes valid. In *Caulkins v. Hellman* (47 *N. Y.* 449), it is said to be a sufficient acceptance, where the purchaser has *inspected* the goods purchased, and directed the goods to be delivered to a designated carrier. That was this case.

The cases of *Brand v. Fotch* (3 *Keyes*, 409), and

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Opinion of the Court, by SPEIR, J.

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Stone v. Browning (51 N. Y. 211), are distinguishable. In the former it was found to be clear that the vendors never did and never intended to make any delivery of the property in whole or in part. And it was held in that case that a mere symbolical delivery, &c., i. e., of a bill of lading, was not enough to show an acceptance. And in the latter case the purchaser, by the terms of the contract, was allowed a week for examination of the property after delivery. The Court held it was a question for the jury whether there had in fact been an acceptance.

In either view, therefore, of an acceptance by the authorized agent of the defendant, or of an acceptance by himself, when the purchase was completed, there was enough shown to take the contract out of the operation of the statute, and it was error to dismiss the complaint on that ground.

The verdict must be set aside, and a new trial ordered, with costs to the plaintiffs to abide the event.

*Starr & Ruggles*, for plaintiffs and respondents.

*De Witt C. Brown*, for defendant and appellant.

BY THE COURT.—SPEIR, J.—The motion to dismiss the complaint was put upon the ground that the contract was void under the statute of frauds, there being no proof that the defendant had accepted the wagon, and that there was no proof of delivery.

The learned judge in his opinion for granting a new trial assumes that the parties had agreed upon the terms of sale, and nothing remained but to deliver the property.

Conceding that this was the agreement in respect to the wagon, I think it can hardly be said from the evidence in the case, that the jury would be warranted in finding that the defendant agreed to accept the wagon

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as it was, with shafts for one horse, and pay the four hundred and seventy-five dollars.

It appears the defendant wished a pole for the wagon for two horses, and asked the price of a pole, and the plaintiffs asked forty dollars. One of the plaintiffs, after having testified that he sold the wagon to the defendant at four hundred and seventy-five dollars, and delivered it, pursuant to the defendant's directions, at McDonnell's stable, on cross-examination further testified :

"Q. What did he (defendant) say about it?

"A. He refused to give that for a wagon-pole.

"Q. Refused to pay forty dollars?

"A. Yes, sir.

"Q. What did he say about that?

"A. He said he had a pole, that he had several poles, and designated one especially that he wanted us to fit to this wagon. I told him if it was possible for us to do so without going to very great expense, in fact making almost a new pole, we would do so.

"Q. For the four hundred and seventy-five dollars?

"A. Yes; without extra expense, so far as the pole was concerned.

"Q. Did he give you an order, or tell you where to get it.

"A. He told us where to get it. We sent and got it to see if it could be made to fit this wagon without going to too great an expense, and if so, we agreed to do it."

The plaintiffs decided it could not be fitted to the wagon. The above took place after the price of the wagon had been agreed upon by the parties. The defendant was not consulted in relation to the plaintiffs' decision in not attaching the pole, nor does it appear he had notice of it, nor that he consented to accept the wagon without the change.

The above statement and testimony fairly presents

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all the facts in the case which bear upon the question to be determined. Was there such a receipt and acceptance of the wagon by the vendee as to pass the title, or make the vendee liable for the price?

It is to be observed that the contract is oral, no part of the price was paid by the vendee, and I think the learned judge applied to this case the rule as to delivery, which would be applicable to a valid written contract of sale, which can not apply to a contract void by the statute of frauds. In the case of a sale in writing, a delivery pursuant to the contract at the place agreed upon for delivery of the goods, in conformity with the terms of the contract, will pass the title to the vendee without any receipt or acceptance of the goods by him. By the statute of frauds there must not only be a delivery of goods by the vendor, but a receipt and acceptance of them by the vendee to pass the title, and this acceptance must be voluntary and unconditional (Rapallo, J., *Caulkings v. Hellman*, 47 *N. Y.* 449).

The plaintiffs undertook to prepare the pole to the wagon, if it could be done without too much expense; obtained the defendant's pole for that purpose; and, without consultation with him, made, as they say, the delivery. No acceptance by the defendant is shown to have taken place—at least no voluntary or unconditional acceptance. It is agreed in all the cases, in order to supply the place of a written contract, some act is required on the part of the vendee or his agent, manifesting an intention to accept the goods as a performance of the contract. It is difficult to see how the defendant can be said to have accepted the wagon which he had not seen or inspected after the plaintiffs had undertaken a conditional alteration, the result of which was absolutely unknown to the defendant.

The case of *Cross v. O'Donnell* (44 *N. Y.* 661), is relied on as an authority for the proposition that a delivery to a designated carrier is sufficient to take the

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case out of the statute. It holds only that the receipt and acceptance need not be simultaneous, but that they may take place at different times. Either may precede the other; and after both have concurred the contract becomes valid.

This, as an authority, assumes that the receipt and acceptance exists as an ascertained fact, and decides only that they need not occur at the same time. The question here is, was there any receipt and acceptance by the defendant? All the case above cited decides is, that where the vendor's contract is merely to move the goods to a specified place, the moment this is done, and the purchaser assumes charge thereof, and takes actual possession of any portion, the statute of frauds is satisfied.

Did the defendant take any charge, or actual possession of the wagon? I think not. The answer admits that the plaintiffs delivered the wagon with shafts without defendant's knowledge or authority. This is not such a delivery as should bind the defendant in a contract under the statute. Besides, the only witness who testifies on the subject says, that he had no personal knowledge whether the wagon went to McDonnell's stable or not. There is no evidence that the defendant even saw the wagon at any time after the plaintiffs undertook to fit the pole to it, nor does it appear that he was told by the plaintiffs, or knew that it was difficult or expensive so to do.

GARDNER, J., says, "The language of the statute is unequivocal, and demands the action of both parties, for *acceptance implies delivery*, and there can be no complete delivery without acceptance" (Shindler v. Houston, 1 Coms. 261). The following cases are referred to as authority in this case: Stone v. Browning, 51 N. Y. 211; Cross v. O'Donnell, 44 Id. 661; Caulkins v. Hellman, 47 Id. 449; Brand v. Fotch, 3 Keyes, 409; Story on Sales, § 276.

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Statement of the Case.

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The order appealed from should be reversed, with costs.

FREEDMAN and CURTIS, JJ., concurred.

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SAMUEL SCHIFFER, PLAINTIFF, v. THOMAS PRUDEN, DEFENDANT.

DOWER. FORFEITURE OF, BY REASON OF ADULTERY.

1. *What necessary to make adultery operate as a forfeiture in this state.*

1. A JUDGMENT DISSOLVING THE MARRIAGE CONTRACT by reason of the wife's adultery is *necessary*.

a. A judgment rendered in an action of divorce *a vinculo matrimonii*, brought by the husband, adjudging the wife guilty of adultery, but also adjudging the husband guilty of adultery, and *adjudging the plaintiff not entitled to a dissolution of the marriage contract is NOT SUFFICIENT.*

Before FREEDMAN, CURTIS, and SPEIR, JJ.

*Decided February 1, 1875.*

This is a controversy submitted, without action, under section 372 of the Code.

An agreement, in writing, was made on October 1, 1874, between the parties, by which Schiffer agreed to sell, and Pruden agreed to purchase, a lot of land in the city of New York, for seven thousand dollars, to be paid in cash on delivery of a proper deed to Pruden, containing a general warranty and the usual covenants for assuring to him the fee simple of the premises, free from all incumbrances.

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Statement of the Case.

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Schiffer, at the time and place mentioned in the agreement, tendered to Pruden the requisite deed, containing a proper description of the parties and premises, duly signed, sealed, and acknowledged, and demanded of Pruden seven thousand dollars, who refused to pay and to accept the deed, claiming that the premises were not free from incumbrances, but were subject to the inchoate right of dower of Mrs. Harriet Dietz, wife of John G. Dietz.

The lot had been conveyed to Schiffer by John G. Dietz, May 1, 1872, by deed executed and acknowledged by him alone, who was then a married man; and his wife Harriet Dietz, then and still living, did not join with her husband in the conveyance; nor did she then, or at any time, execute or deliver to Schiffer, or to any one else, any conveyance or release of her right of dower in the premises. Dietz at the time owned said lot in fee simple, subject to the inchoate right of dower of Harriet Dietz.

On March 17, 1873, John G. Dietz commenced an action in this court against Harriet Dietz, for a divorce on the ground of her adultery, charging specific acts. She appeared in the action, denied the adultery charged, and by way of counter-claim charged adultery against John G. Dietz. The action was referred to a referee, who reported that both parties to the action had been guilty of adultery as charged.

On July 1, 1874, a judgment or decree was entered in the action, adjudging and decreeing the report of the referee, so far as the same finds and reports that Harriet Dietz did commit adultery, as charged in the complaint, be confirmed; and that the report that John G. Dietz did commit adultery, as charged in the counter-claim, be confirmed, and that the plaintiff is not entitled to the relief asked for in his complaint, and that the defendant is not entitled to the relief asked for in her counter action.



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Plaintiff's points.

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*Charles Jones*, attorney, and of counsel for plaintiff urged :—I. Prior to the making of the agreement and the tender under it, *Harriet Dietz* had ceased to have any right of dower, inchoate or otherwise, in any part of the said premises.

(1.) By the statutes of this State it is provided that "a wife being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate or any part thereof, nor to any distributive share in his personal estate" (2 *Rev. Stat.* 146., § 48 ; 3 *Id.* (5th ed.), 237, § 61).

II. In *Wait v. Wait* (4 *N. Y.* 95), at page 100, the court in enumerating some of the ways in which a wife may be divested of dower, includes her conviction of adultery in a suit for divorce brought by her husband, referring to the provision of the statute above mentioned (*Pitts v. Pitts*, 52 *N. Y.* 593). In this case the referee having found that the wife had committed adultery, but that the husband had condoned it, judgment was entered in favor of the wife, dismissing the complaint. The court of appeals held that the adultery having been condoned, it was the same in effect as if she had never been guilty of adultery, and that, therefore, there could not be a conviction of adultery. In the opinion, however, the court states the broad proposition that "a wife can only be barred of dower by conviction of adultery in an action for divorce, and by the judgment of the court in such action."

III. The following provision in the Revised Statutes, "In case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed" (1 *Rev. Stat.*, pt. 2, ch. 1, tit. III, § 8, 741 ; 3 *Id.* (5th ed.) 32, § 8), does not affect this case. The only misconduct for which a divorce dissolving the marriage contract in this state can be granted is adultery (2 *Rev. Stat.*, 144, § 38 ; 3 *Id.* (5th ed.) 235, § 51).

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Defendant's points.

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It is plain that the two sections of the statute do not refer to exactly the same thing—the one provides that a woman shall not be endowed where she is divorced on account of her adultery—the other provides that a woman shall not be endowed where, in an action by her husband for divorce, she shall be convicted of adultery, irrespective of the question as to whether her husband is divorced from her or not.

IV. The history of this provision of the statute, as traced through the law, shows clearly that the construction which should be put upon this statute is, that where the wife is convicted of adultery, irrespective of the question of divorce, except that it must be in an action for divorce, she is barred of her dower (2 *Black Com.*, 130; 4 *Kent Com.*, 52., 13 *Edw. I.*, ch. 34; 2 *Greenl.*, 294, § 7; 2 *Rev. Laws*, 1813, 199, § 8; 2 *Rev. Stat.*, 146, § 48; 3 *Id.* (5th ed.), 237, § 61; 3 *Rev. Stat.* (5th ed.) 32, § 8).

*J. Edgar*, attorney and of counsel, for defendant, urged:—I. At common law, adultery of the wife did not work a forfeiture of right of dower.

II. By the statute of 1787, adultery on the part of the wife worked a forfeiture of dower, unless condoned by the husband (1 *Rev. Laws*, 58, § 7).

III. But that law was repealed by the revised statutes in 1830, and since then, adultery on the part of the wife does not work a forfeiture of dower, unless followed by a decree of divorce *a vinculo* (2 *Rev. Stat.*, 3rd ed., 27, § 8). The statute (2 *Rev. Stat.*, 3rd ed., 205, § 46) which is almost a re-enactment of 2 *Rev. Laws*, 199, § 8, must be construed to mean that, in an action for divorce, a conviction of adultery can only be by a decree of divorce. In such an action, although the wife be found guilty of adultery, she can only be convicted of adultery by a judgment of divorce, and not by a judgment of dismissal of the action (See *Re-*

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*viser's Notes*, 3 *Rev. Stat.* (1st ed.) 597, § 8; 2 *Scribner on Dower*, 502; *Reynolds v. Reynolds*, 24 *Wend.* 193, 196, 197; *Waite v. Waite*, 4 *Comst.* 95, 102; *Cooper v. Whitney*, 4 *Hill*, 99). In the case of *Deitz v. Deitz*, the finding of the wife guilty of adultery was not a necessary finding for dismissing the complaint of the husband, and consequently no conviction. It was only a necessary finding for the dismissal of her cross-action. But the statute does not provide that if a wife be convicted of adultery in an action brought by her for divorce, she shall not be endowed, &c. This statute was never intended to benefit the husband guilty of the same sin as the wife. The old principle "that he who asks equity must do equity," may be considered to cover this case. The husband and wife may yet be reconciled, and their respective misconduct condoned, in which event no one could claim that the wife was not endowed of the husband's real estate.

BY THE COURT.—SPEIR, J.—The question presented for consideration, is whether Mrs. Harriet Dietz has an inchoate right of dower to the land agreed to be conveyed.

By our statute, which is taken substantially from the common law, "No act, deed, or conveyance executed or performed by the husband, without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law to pass the estate of married women, and no judgment or decree confessed by, or recovered against him, and no laches, default, coven, or crime by the husband, shall prejudice the right of the wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto" (*Rev. Stat.* 693, § 16, *Edmonds' ed.*).

Dower is a title inchoate, and is an interest which attaches on the land as soon as marriage and seizin concur. This right is consummated upon the death of

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Opinion of the Court, by SPERD, J.

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the husband. While the husband lives the wife has no right, interest, or estate in the land, but she has the capacity to take in the event of her surviving her husband,—she is dowable. When she becomes a widow she is entitled to dower. BRONSON, J., in *Reynolds v. Reynolds* (24 *Wend.* 193), says, "It was the widow, not the wife, who was provided for by Magna Charta" (9 *Hen. Ch.* 7; 2 *Inst.* 16). The relation of husband and wife must have existed, and it is this relation which invests the wife with *dowable capacity*. If there be seizin during coverture the capacity to be endowed is converted into what is called an inchoate right of dower, "which attaches on the land as soon as marriage and seizin concur" (4 *Kent. Com.* 50). Hence the statute before cited enacts, in accordance with the common law, that the husband alone can not defeat his wife's estate by any act in the nature of alienation or charge without the assent of the wife given and proved according to law.

The interest of the wife which has thus attached by the concurrence of marriage and seizin,—her inchoate right of dower—may be barred or divested in many ways, as by her uniting with her husband in the execution of a conveyance, or by sale under foreclosure of a mortgage for the purchase-money, or by conviction of adultery in a suit for divorce brought by her husband (2 *Rev. Stat.* 146, § 48).

The question here is, whether the wife's inchoate right of dower is barred by a determination in a suit in which both she and her husband have been found guilty of adultery, there being no decree dissolving the marriage relation. The facts in the case present a new question in the construction of the statutes relating to the forfeiture of dower.

The common law gave to the wife a right of dower in all lands of which the husband was seized during marriage, and the same has by statute become the law

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of this state (1 *Rev. Stat.* 691. § 1, *Edm. Stat. at L.*).

Prior to 1830, by the statute of 1787, adultery on the part of the wife worked a forfeiture of dower, unless condoned by the husband. By the repeal of that law, the mere fact of living in adultery ceased to be a bar to dower. A new provision was made in the following words: "In case of divorce dissolving the marriage contract for the *misconduct* of the wife, she shall not be endowed" (1 *Rev. Stat. Edm. Ed.* 692, § 8). Under this statute which relates to "estates in dower," the adultery which is doubtless the misconduct referred to, is not enough to disbar. It must be followed by a dissolution of the marriage contract.

The argument of the learned counsel for the plaintiff is put upon the ground that inasmuch as the only misconduct of the wife for which a divorce dissolving the marriage contract in this state can be granted, is adultery, and as by section 48 of the statute, relating to divorces, which says nothing about a divorce having been decreed, but simply provides, "that whenever, in a suit for divorce brought by her husband, the wife shall be convicted of adultery, she shall not be entitled to dower," he claims it does not follow that the husband should obtain a decree of divorce in his favor in order to disbar his wife.

It appears to me that the statute has provided for the case where the fact of adultery has been established. By section 42 of article 3, 2 *Rev. Stat.* 151, *Edm. Ed.*, it is enacted, "although the fact of adultery be established, the court may deny a divorce in the following cases," of which the fourth subdivision of this section is one, as follows: "Where it shall be proved that the complainant has also been guilty of adultery under such circumstances as would have entitled the defendant, if innocent, to a divorce." This is the case at bar. The complainant was proven guilty of adultery

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Statement of the Case.

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which would have entitled the defendant, had she been innocent, to a divorce, and the court must deny the husband's divorce.

The marriage relation, therefore, continues to exist between the parties, notwithstanding both have been found guilty of adultery, and the wife is not divested of her inchoate right of dower to his land (*Pitts, et al. v. Pitts, et al.*, 52 *N. Y.* 593; *Reynolds v. Reynolds*, 24 *Wend.* 193; *Waite v. Waite*, 4 *Coms.* 95).

The defendant, Thomas Pruden, is entitled to judgment, with costs.

FREEDMAN and CURTIS, JJ., concurred.

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SAMUEL H. RANDALL, PLAINTIFF AND RESPONDENT, v. CHARLES DUSENBURY, TRUSTEE, & CO., DEFENDANT AND APPELLANT.

I. LIEN ON TRUST FUNDS FOR SERVICES RENDERED TO THE TRUSTEE ON HIS EMPLOYMENT.

1. WHEN TRUSTEE MAY CONTRACT TO GIVE A LIEN.

a. Where the trustee *has no funds* in his hands and *services are necessary* to be performed, either *for obtaining possession, or for the preservation of the trust property*, he may enter into a contract to have the same performed, not on his personal responsibility, but solely on the faith and credit of the trust property so that payment thereto shall be contingent on success and to be made out of the trust property.

1. EXCEPTION. This is an exception to the general rule that a trustee *can not* make a contract with a third party which shall *bind the estate or fund*, and is *personally liable* for his contracts with regard to the estate or fund.

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Statement of the Case.

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**II. ESTOPPEL.****1. PERSONS ACTING UNDER THE CLAIM OR PRETENSE OF BEING TRUSTEES.**

- a. Having in proceedings instituted by them *secured the fruits* of the services of one employed by them, they are estopped from *shielding themselves against liability for payment for such services out of such fruits, on the ground that their acts were unlawful and void.*

**III. ASSIGNMENT UNDER ACT OF 1860, § 848.****1. VALIDITY OF, ATTACKING COLLATERALLY.**

- a. *It can not be so attacked on the ground that it was not acknowledged before delivery.*

Before FREEDMAN, CURTIS and SPEIR, JJ.

*Decided February 1, 1875.*

The action was brought to recover three thousand and fifty dollars from defendant, as trustee of a certain surplus fund under an assignment or deed of trust from one Selah Hiler to one George W. Haight, to which defendant succeeded as trustee on resignation of said Haight.

The assignment directed the payment of said fund to said Hiler's creditors "after first paying all legal expenses growing out of said trust." The claim is for professional services rendered by plaintiff as attorney and counsel to the trustees on the faith and security of the fund, in collecting and securing against adverse claimants the sum of seven thousand one hundred and ninety-two dollars of said fund, and to have said three thousand and fifty dollars declared a lien thereon, and for payment of the claim and lien from the fund prior to all other payments.

Certain issues of fact were directed to be submitted to the jury which were found in plaintiff's favor, and thereafter the action was again brought on for final hearing under an order of the court at the special equity

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Appellant's Points.

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term, and judgment was entered in favor of plaintiff against defendant for the amount claimed, directing payment from the fund as claimed by the plaintiff.

The case comes up for review (upon case and exceptions), on appeal by defendant, from the judgment.

*L. M. Northrop*, attorney, and *Ira D. Warren*, of counsel, for appellant urged:—I. Haight was never a trustee under such assignment. He never had, as trustee or otherwise, any title to, or interest in such fund. The pretended assignment was absolutely void on its face, for the reason that it was never acknowledged before delivery, as required by *Laws of 1860*, ch. 348, § 1. The title of this whole fund is still in Huyler (*Hardman v. Bowen*, 39 *N. Y.* 196; *Britton v. Lorenz*, 45 *Id.* 55). “A trustee of a void deed can not claim a lien on the fund for his expenses. It was as though no trust deed had ever been made” (*Smith v. Dresser*, *L. R.* 1 *Eq.* 251).

II. If Haight ever was a trustee under this instrument, Dusenbury was not. A trustee can not himself appoint a new trustee, though the new trustee consent (*Webb v. Shaftsbury*, 7 *Bing.* 480; *Hubbard v. Ray*, 7 *Hare*, 106; *Kennedy v. Tumly*, 6 *Ired. Eq.* 399; 1 *Edm. Stat.* (2 ed.) 682, § 71). If it be answered that Dusenbury acted as a trustee, and is, therefore, estopped from denying it, we reply that these papers were all known to the plaintiff, and all Dusenbury and Haight's rights under them. A portion of them he drew. He knew all the facts, and the maxim *ignorantia juris non excusat* is not a harsh rule to apply to a lawyer in his own case. There is, therefore, no question of estoppel which will aid the plaintiff.

III. The defendant, as trustee, could not bind the trust estate, nor by any act of his create a lien on it in favor of a third party. This question has been so often passed upon that it may be considered settled



Respondent's points.

(*Austin v. Monroe*, 47 *N. Y.* 367; *Ferrin v. Myrick*, 41 *Id.* 325; *Worrall v. Harford*, 8 *Ves.* 4; *Perry on Trusts*, § 907; *Hill on Trustees*, 4 *Am. Ed.* 879; *Hall v. Laver*, 1 *Hare*, 571; *Lightfoot v. Kean*, 1 *Mees. & W.* 745; *Lewin on Trusts*, 561, and cases cited). The case of *Noyes v. Blakeman* (6 *N. Y.* 567), does not militate against this doctrine. In that case the attorney was employed by the *cestui que trust and trustee*, the trustee expressly stipulating against any personal liability, and both agreeing that it should be paid out of the future income of the estate, which, in fact belonged to the *cestui que trust*. The judgment as it was, was affirmed by a divided court and by only one majority.

IV. The instrument of itself does not create a lien. The language is "to pay all legal and proper disbursements and expenses growing out of said trust." This, the court holds, created a first lien on the trust fund. The case of *Worrall v. Harford*, before cited (8 *Ves.* 4), contained exactly such a provision, but the court held that the attorney had no lien on the fund, and could look to the trustee alone for his fees.

*Samuel H. Randall*, attorney and of counsel for respondent, urged:—I. Defendant is estopped from attacking the validity of his trust, or denying he is trustee, or denying his liability to discharge the duties of his trust, the first of which is "to pay all legal expenses growing out of said trust" (*People v. Norton*, 9 *N. Y.* 176; *Hill on Trustees* 3 *Am. Ed.* § 219; *Cruger v. Halliday*, 11 *Paige*, 319; *Sprigg v. Bank of Mt. Pleasant*, 10 *Pet.* 257; *Welland Canal Co. v. Hathaway*, 8 *Wend.* 480; *Dezell v. Odell*, 3 *Hill*, 215).

II. The clause in the trust deed providing for an accounting between Hiler and his creditors named therein, before payment of their claims by trustees, did not require any attorney who should be employed

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Opinion of the Court, by SPEIR, J.

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by the trustee to secure or protect said fund to first account with Hiler, and get his consent to the payment of claim by trustee.

III. The plaintiff held an attorney's lien on said fund for his services in collecting same, which no change of title of trustee of said fund could affect or destroy; nor did plaintiff ever abandon or give up his lien on said fund for payment of his services (*Bowling Green Savings Bank v. Todd*, 52 *N. Y.* 489; *Fox v. Fox*, 24 *How. Pr.* 418).

IV. While a trustee may not ordinarily make a contract with a third party which shall bind the estate or fund, and is personally liable for his contract with regard to the estate or fund, yet an exception to the rule exists when the estate or fund is in peril, where no funds exist for payment of services to secure or protect it, and where the trustee makes the contract in his representative capacity, and stipulates not to be personally liable in the premises (*Noyes v. Blakeman*, 6 *N. Y.* 567; *Choteau v. Suydam*, 21 *Id.* 180; *Ferrin v. Myrick*, 41 *Id.* 322; Opinion of FREEDMAN, J., *Randall v. Dusenbury*, action No. 2, special term, November, 1874).

BY THE COURT.—SPEIR, J.—On December 7, 1872, Selah Hiler executed and delivered to George W. Haight, an assignment to pay certain specified creditors of Hiler's named, in order "*first* to pay all legal and proper *disbursements and expenses* growing out of said trust," and then provides for payments of specific amounts to various persons, naming each in the order of payments. Those several payments were to be made after an accounting shall have been had by the said respective parties, and the amount due and owing to said parties by Hiler agreed upon, and the balance to be held for Hiler.

It clearly appears that the plaintiff's employment

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Opinion of the Court, by SPEIR, J.

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was made wholly on the faith and credit of the fund, with no compensation for services unless in the event of success ; no money being in the hands of the trustees to pay for services, and the defendant stipulating in no event to be personally liable for plaintiff's services. This arrangement was entered into with the plaintiff by the trustee Haight, his successor the defendant, and Hiler acting as their agent.

The plaintiff under, and by virtue of such employment, rendered services for the benefit of the trust, in securing the fund to the trustee ; the defendant as trustee accepted the benefit of the plaintiff's services and received from the plaintiff the sum of seven thousand one hundred and ninety-two dollars and seventy-five cents of the surplus fund, by a check of the city chamberlain, payable to the order of defendant upon a promise to pay to the plaintiff the amount of his lien upon the fund.

The learned judge has found that the plaintiff under the first provision of the deed of trust has a lien upon the fund, and is entitled to be paid therefrom for his services, as a part "of the legal and proper disbursements and expenses growing out of the said trust," and prior to any payments to be made under the remaining provisions of the deed.

The appellant's counsel asks a reversal of the judgment upon three grounds :

*First.* That the assignment was void on its face, for the reason that it was never acknowledged before delivery, as required by the statute of 1860, and that the title to the whole fund is still in Hiler.

*Second.* Admitting that Haight was a trustee, he could not himself appoint a new trustee even if the latter consent.

*Third.* That the defendant as trustee could not bind the trust estate, nor by any act of his create a lien on it in favor of a third party.

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I am of the opinion that neither the trustee nor his assignor can be allowed to raise the objection on either the first or second grounds. There were no funds in the hands of the defendant to pay for services, no property had passed to him under the deed, and he stipulated that in no event would he become personally liable. The trustee got possession of the trust estate solely through the services of the plaintiff, upon a special agreement that the fund should be charged with the disbursements and expenses growing out of the trust, and upon an employment already recognized by both Haight and Hiler. The omission to have the assignment acknowledged before delivery may be irregular or erroneous and upon a direct proceeding by proper parties may be set aside or reversed, but its validity can not be questioned in a collateral action. These parties can not be allowed upon any principle of law or justice (after having secured the fruits of plaintiff's services through proceedings instituted by them) to shield themselves upon the ground that their acts were unlawful and wholly void. The defendant, after having obtained the property under the pretense of being the trustee can not be permitted to deny his liability to account as such. This is an exception to the general rule which undoubtedly is, that a trustee can not ordinarily make a contract with a third party which shall bind the estate or fund, and is personally liable for his contracts with regard to the estate or fund (*People v. Norton*, 9 *N. Y.* 176 ; *Noyes v. Blakeman*, 6 *Id.* 567). The principle is a familiar one that no acts of the assignor, after the assignment has been executed and delivered and possession of the property taken by the assignees, or any omission on his part can invalidate the assignment. This rule applies with equal force to the assignees (*Hardman v. Bowen*, 39 *N. Y.* 196, and cases cited).

The last objection is also untenable.

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Concurring opinion of FREEDMAN, J.

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It is clearly settled that it is the duty of the trustee to use reasonable diligence to protect the trust estate, and that under certain circumstances he will have a lien upon it for the expense of such protection, although not expressly provided for in the instrument creating the trust. In the case at bar, the provision is explicit, "to pay all legal and proper disbursements and expenses growing out of said trust."

It has been repeatedly adjudged in this court, in the late court of chancery, and in the court of appeals, that a debtor may provide in his assignment for present and prospective costs of suits going on, and that may be brought, relating to some of the assigned property, without its invalidating such assignment, by a provision authorizing the assignee to prosecute or defend all suits which he may deem necessary to the execution of the trust.

These decisions are put upon the ground that although they give to the trustee large and extensive powers, which may be liable to abuse; yet it can not be said that they grant any other or further power or authority than the law would imply as necessary to carry the trust into execution (*Lentilhon v. Moffat*, 1 *Edw. Ch.* 451; *Van Nest v. Yoe*, 1 *Sand. Ch.* 4; *Jacobs v. Remson*, 36 *N. Y.* 668; *Townsend v. Stearns*, 32 *Id.* 209).

The judgment must be affirmed, with costs.

CURTIS, J., concurred.

FREEDMAN, J. (concurring). — At the trial the learned judge seems to have had before him, among other things, not only the findings of the jury upon the questions submitted to them, but also the testimony upon which such findings were based; and his decision recites that such findings were approved and adopted by him. From such testimony it appeared

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Concurring opinion of FREEDMAN, J.

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that the arrangement made with the plaintiff as to the rendition of services, was assented to by Haight, Hiler, and the defendant; that plaintiff's employment was made wholly on the faith and credit of the expected fund; that his compensation depended upon his success; that at the time of the making of the arrangement there was no money, or fund, or property, in the hands of, or under the control of, the trustee with which to pay the plaintiff; that the defendant had stipulated against a personal liability; and that the defendant, as trustee, received from the plaintiff the amount of the surplus fund in the shape of a check of the city chamberlain, upon his promise to pay the plaintiff the amount of the lien which plaintiff claimed to have.

The judge, therefore, might, and if he had been requested, undoubtedly would have found these additional facts, especially as, with the single exception of defendant's promise, as to which there was a conflict of evidence, the existence of these facts was not questioned, but tacitly conceded by all parties; and these facts, if found, would have brought the case directly within the decision of the court of appeals in *Noyes v. Blakeman*, 6 N. Y. 567.

That these facts were not found, constitutes no sufficient reason for a reversal. Every reasonable intentment on questions of fact as well as of law, is to be made in support of the judgment, and the appellant was bound to show error. This he has not done.

It has even been held that where a judgment, after a trial by the court, comes up for review without any findings of fact, nothing will be presumed against the correctness of the decision, but the presumption will always be in the favor of the decision rendered (*Viele, et al. v. Troy & Boston R. R. Co.*, 20 N. Y. 184; *McKeon v. See*, 4 Rob. 449, affirmed, 51 N. Y. 300).

I therefore concur, that, for the reasons stated by my brother SPEIR, the judgment should be affirmed.

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Statement of the Case.

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**MARGARET L. HOFFMAN, PLAINTIFF AND APPELLANT, v. WILLIAM E. TREADWELL, DEFENDANT AND RESPONDENT.**

*Relief in equity by a married woman who seeks the cancellation of promissory notes made and endorsed by her for the accommodation of her husband.*

In the case at bar, the plaintiff, a married woman, made and indorsed five several promissory notes of five hundred dollars each, for the accommodation of her husband; one of which has been collected after judgment, an action commenced upon another, and separate actions threatened upon each of the others. She claims that she is not liable for the payment of either of these notes, and states sufficient reasons that would amount to a valid defense to any action brought against her on the same, and she prays for equitable relief.

1. That her signature on the notes be canceled.
2. That she be released from all liability by reason of her signature upon them.
3. That defendant be enjoined and restrained from commencing or maintaining any action against her on account of said notes.

On the demurrer of the defendant alleging that the complaint did not state facts sufficient to constitute a cause of action. *Held*—That although the plaintiff incurred no legal obligation by her indorsement, &c. (Phillips v. Wicks, 86 Super. Ct. 254) and has a valid defense to any action upon them, she can not relieve herself of the obligation in a court of equity. She must wait until she is summoned before a court of law, when her defense interposed will be heard, and her legal rights declared.

Under the decisions and under the principles of equity, as adjudicated and understood, nothing appears in the facts of this case that will give a court of equity jurisdiction. The remedy of the plaintiff is perfect, and attainable in a court of law, in her answer to any action brought on these notes or any one of them.

The demurrer sustained.

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Statement of the Case.

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Before MONELL, Ch. J., and FREEDMAN, J.

*Decided March 1, 1875.*

Appeal from an order sustaining a demurrer.

In her complaint the plaintiff alleges that she is the wife of Lindley M. Hoffman.

That under the circumstances hereafter stated she wrote her name upon the back of five several promissory notes, bearing the same date, and being for the same amount, but payable at different times.

One of said notes is as follows :—

“\$500. NEW YORK, *February 1, 1871.*

“Twenty-one months after date, I promise to pay to the order of Mrs. Margaret L. Hoffman five hundred dollars, value received.

{ Internal Revenue }  
Stamp.

“M. L. HOFFMAN.

“No. , due Nov. 1-4, 1872.”

Upon the back of said note was written “M. L. Hoffman.”

The plaintiff then alleges that she is not engaged in any business; that her indorsement was at the request and for the accommodation of her husband, and was without consideration; that she had no knowledge that her husband intended to deliver the notes to the defendant; that she did not charge or intend to charge her separate estate; that no benefit resulted to her separate estate; that the defendant commenced an action against her in the marine court, in the year 1872, upon a note for five hundred dollars, bearing the same date as the notes herein described; that the defenses which she had thereto, as set forth herein, were not, through oversight, averred in her answer, nor presented on the trial of that action; that judgment therein was recovered and affirmed by the court



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Statement of the case.

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of common pleas against her, and that she has paid the same.

That the defendant has, since the commencement of this action, brought suit against her on the note for five hundred dollars fourthly described in the complaint, in which suit she has answered; that that action is still pending, and has not yet been reached for trial.

That the plaintiff, before the commencement of the action by the defendant last mentioned, requested him to commence one action on all of the five notes herein described, and not to bring separate actions on each note; but that he declined so to do.

That it is the defendant's purpose to bring separate actions against her on each of the said five notes, at intervals of time, so as to increase the costs; and to get an advantage, in subsequent actions, of the knowledge of defense and evidence she sets up and presents in the earliest one; and that he brings his actions in the marine court, in order to prevent the actions from going to the court of appeals on appeal.

That the action upon the first note upon which judgment went against the plaintiff, as stated in section 13 of this complaint, was not tried upon the allegations made in this complaint, nor upon the evidence which plaintiff is ready and able to present on the trial of this action, and that the decision in that action has no bearing upon the cause of action herein set forth.

That all of the six notes herein set forth and referred to, were made in one transaction, at the same time, of uniform date, and for an aggregate sum of three thousand dollars, divided only into parcels in respect to the time at which the several notes should mature.

The plaintiff demanded judgment against the defendant:

1. That her signature upon the said five notes, and each of them, be canceled.
2. That she may be released and discharged from

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Opinion of the Court, by MONELL, J.

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all liability, by reason of her signature upon said notes, and each of them.

3. That the defendant be enjoined from commencing or maintaining any action for the enforcement of the notes above set forth, or either of them, against the plaintiff, and for such other and further relief as may be just.

The defendant demurred, alleging that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer was sustained at special term, and the plaintiff appealed.

*Mr. W. R. Martin*, for appellant.

*Mr. N. Quackenboss*, for respondent.

BY THE COURT.—MONELL, Ch. J.—Upon the facts stated in the complaint, the plaintiff incurred no legal obligation by her indorsement. Being a married woman, and not binding or intending to charge her separate estate, and deriving no benefit, either directly or indirectly, from her indorsement, the plaintiff can not be held responsible upon her contract (*Phillips v. Wicks*, 36 *Sup'r Ct. R.* 254).

It is proper, therefore, to assume, that she has a valid defense to any action which may or might be brought against her to recover upon the notes. But is that, in conjunction with the other facts stated in the complaint, sufficient to sustain the present action?

It is a principle of equity, that where no remedy to enforce a right exists elsewhere, chancery, to prevent a total failure of justice, will furnish the remedy. So if the remedy at law is doubtful and very difficult, it is equally a principle of equity, that if the remedy at law is adequate and attainable, chancery will not entertain jurisdiction.

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Opinion of the Court, by MONELL, Ch. J.

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The case before us falls within the latter principle. There is no doubt that the plaintiff can, at law, avail herself of her defenses to the notes; and unless the circumstances under which her indorsement was given, and her marital relation, give her some superior equity, she must wait until she is summoned before a court of law, before she can relieve herself of her obligation.

The judgment demanded is the cancelation of the plaintiff's signature, and her discharge from liability which is equivalent to a cancellation of the instrument itself, but which is never done, except where the grounds upon which it is sought is such, that a court of equity alone can take cognizance of it; and the general principle applicable to all these cases may be included under one common head of equity jurisdiction, the prevention of an injury that might otherwise prove irreparable.

These common heads are carefully collected in *McHenry v. Hazzard* (45 *N. Y.* 580), but the facts stated in the complaint before us do not bring this case within any of the heads there collected; nor can I bring it under any known head of equity jurisdiction.

The attempt of the plaintiff is to avoid her contract, on the ground that she had no legal capacity to make it. She does not allege any fraud, deceit, misrepresentation, duress, or oppression, under which she made it. She voluntarily gave her signature, and probably knew that it was intended as a security for her husband's debt, or to enable him to negotiate the paper.

There is nothing, therefore, that a court of equity can seize upon, to give it jurisdiction.

In *Geer v. Kissam* (3 *Edw. Ch.* 129), the court refused to order the cancellation of a promissory note, where it appeared there was a defense at law. The vice-chancellor says, "the note being past due can be negotiated no further to the complainant's prejudice.

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Opinion of the Court, by MONELL, Ch. J.

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It will always be subject to the same equity and defense in the hands of any subsequent holder that it is now subject to. It is only when there is danger that a negotiable instrument *improperly* obtained, or which ought not to be negotiated, will get into the hands of a *bona fide* holder, without notice, and for a valuable consideration, to the prejudice of the rights of the maker, that this court ought to interfere to restrain the negotiation, and to cause it to be delivered up."

In *Allerton v. Belden* (49 N. Y. 373), the plaintiff, an accommodation indorser, sought the cancellation of his signature, on the ground that the note was void for usury. The complaint alleged these and other reasons for equitable relief, but the court, on demurrer, held the reasons to be insufficient, and that the remedy at law was adequate.

The want of legal capacity to make the contract in question, by reason of the marital relation of the plaintiff, does not increase or enlarge her equity.

A married woman may, for some purposes, make a valid contract. She may do so in respect to her separate estate, and in her separate trade or business.

So she may become security for another ; but the intent to charge her separate estate must appear, or the consideration must move directly to the benefit of her separate estate or business. Unless one or the other of these is shown, as was early held in *Yale v. Dederer* (18 N. Y. 265), she incurs no liability upon her contract.

A married woman being, therefore, competent to contract in all cases, where she intends to charge or bind her separate estate, she can only successfully defend against her contract, on the ground that the intention to bind her separate estate, or that she was benefited by the contract, is not shown, and such defense can be alleged in an action brought upon the contract to enforce its obligation.

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Statement of the Case.

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It may be desirable and convenient to end the litigation which must ensue upon an attempt to collect the notes. But it can not be done in the action now before us. A judgment was obtained upon one of the notes which the plaintiff has paid ; and she alleges a suit now pending to recover upon another. The remaining notes must soon be prosecuted, or they will be barred by the statute of limitations. And as they are all due, separate actions would be consolidated. There can not be such a multiplicity of suits as would authorize a court of equity to take charge of the litigation, even if that was a ground for interference, and the plaintiff must abide the time when she can assert her defense at law.

The order sustaining the demurrer must be affirmed, with costs.

FREEDMAN, J., concurred.

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ELLEN GOLDBERG, PLAINTIFF AND RESPONDENT,  
v. GEORGE W. DOUGHERTY, DEFENDANT AND  
APPELLANT.

Fraudulent representations, made by one member of a firm, which induced the purchase of property from the firm, creates a liability wholly disconnected from the liability of the firm, upon the contract made with them. For the fraud the member of the firm committing the same is alone liable to the person injured.

The recovery of a judgment against the firm (by the person defrauded) upon the violation of the contract, is no defense to an action against the individual member of the firm for the fraud.

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Opinion of the Court, by MONELL, J.

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The causes of action are several, and the obligation or liability incurred by the individual member, by his deceit, is an additional and separate security to the purchaser (*Morgan v. Skidmore*, 55 Barb. 268).

Before MONELL, Ch. J., and FREEDMAN, J

*Decided March 1, 1875.*

Appeal from an order overruling a demurrer to the complaint.

The complaint alleged that the defendant, a member of the firm of Utley & Dougherty, made certain false and fraudulent representations to the plaintiff concerning the value of certain bonds; and thereby induced plaintiff to purchase of said firm several of said bonds, they giving to her a written agreement to re-purchase the same from her at any time within six months, at the price she paid therefor. It is then alleged that an action *upon said agreement* was brought, and a judgment recovered therein against the said firms, but which is unpaid.

The relief demanded is to recover damages for the fraud.

The defendant demurred for insufficiency. The court overruled the demurrer. The defendant appealed.

*G. A. Black*, for the appellant.

*H. O. Southworth*, for the respondent.

BY THE COURT.—MONELL, Ch. J.—The case made by the facts stated in the complaint can not be distinguished from *Morgan v. Skidmore* (55 Barb. 263), affirmed by the court of appeals (not reported). In that case the fraudulent representations were made by an individual member of a copartnership firm, in regard to the solvency of the firm, and the sale was made to the firm in reliance upon the truth of the represen-

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Opinion of the Court, by MONELL, J.

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tations of the individual member. Upon the failure of the firm to pay, it was sued, and a judgment upon their contract obtained. The court held that the recovery of the judgment against the firm upon its contract was not a defense to an action against the individual member for the deceit. The causes of action, they say, are several, and the guaranty or obligation incurred by the individual member is an additional and independent security to the creditor.

When the defendant in this action made the fraudulent representations, he at once became liable for the fraud. And that liability was in no way affected by the independent agreement which was the subject of the action against the firm.

The objection that there was no offer to make restitution by the plaintiff of the property purchased, is inapplicable to the case made by the complaint. There was no disaffirmance of a contract entered into by the defendant. The only contract was made by the firm, of which the defendant was a member, and that contract and its breach was the cause of action upon which the judgment was obtained. Nor did the recovery of the judgment disaffirm the sale, or affect any liability which has been incurred under it. The defendant stood, in a sense, as security, and was liable in the same manner as if he had guaranteed the debt of a third person. In a word, his liability was wholly disconnected from the liability of his firm, which subsisted upon the written agreement alone. The sale was perfected and the bonds delivered. Except for the agreement to repurchase, the plaintiff could have had no remedy for any loss against the firm. And for the fraud the defendant alone can be held.

The order overruling the demurrer should be affirmed, with costs.

FREEDMAN, J., concurred.

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Statement of the Case.

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THOMAS RAE, PLAINTIFF AND APPELLANT, v.  
THE MAYOR, &c., OF NEW YORK, ET AL.,  
DEFENDANTS AND RESPONDENTS.

**ASSESSMENTS.**

The act of 1858 (*Session Laws*, 1858, ch. 888) authorized a judge of the supreme court, at special term, to vacate assessments upon the allegation and proof of "*any fraud or legal irregularity*" therein.

An amendment to this act, by the act of 1874, struck out the words "*or legal irregularity*," and substituted the words, "*or substantial error*," and a further amendment provided that "hereafter no suit or action in the nature of a bill in equity, or otherwise, shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but the owners of property shall hereafter be confined to their remedies in such cases to the proceedings under the act hereby amended."

In the case at bar the plaintiff seeks to restrain, by injunction, the sale of his property by the corporation, and the collection of the assessment by any other mode or process, thus invoking the equity jurisdiction of the court, for relief, instead of the remedies provided in the act,

*Held*, that such an action can not be maintained. The remedies under the act are adequate to the relief of the plaintiff, and should be pursued by him.

**SUPERIOR COURT; ITS JURISDICTION.**

The act of 1874, is not in conflict with the provision of the constitution (art. 6 § 12) which continued the superior court with the powers and jurisdiction that it held and possessed at the time of the adoption of the constitution.

The act of 1874, merely affects the remedy to be pursued by the person injured.

The legislature has always, and rightfully, assumed the power to change the forms of proceedings and remedies, and to limit them to certain tribunals, and any general law affecting the mode of obtaining a remedy, can not be construed into an infringement of constitutional jurisdiction or power.



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Statement of the Case.

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*Held*, that the amendment of 1874, is a valid and constitutional law.

Before MONELL, Ch. J., and VAN VORST, J.

*Decided March 1, 1875.*

Appeal from an order dissolving an injunction.

The action was to obtain an injunction to restrain the defendants from selling or leasing for a term of years certain real estate of the plaintiff, for the non-payment of an assessment for grading one of the avenues in the city, or from otherwise interfering with the quiet possession and enjoyment of such real estate by the plaintiff.

The complaint alleged that an assessment for grading the avenue was confirmed, and was thereby imposed upon such real estate; that the said assessment is apparently valid, but that the same is in fact wholly void by reason of certain extrinsic facts, which can only be established by other evidence than the assessment itself, namely, from the contract under which the work was done, and the surveyor's return of such work; that the defendants threaten to sell said real estate for the non-payment of said assessment.

It is alleged that the assessment is illegal, and void, and fraudulent for the following reasons:

*First.* That there is included in the assessment and assessed upon the property of the plaintiff, with others, the sum of one hundred dollars, alleged to have been paid the aforesaid contractors, for drain pipe, which drain pipe was not called for or authorized by the contract, and was not otherwise legally or rightfully furnished or authorized.

*Second.* That there is included in the assessment, and assessed upon the property of plaintiff, with others, the sum of nineteen thousand and fifty-three dollars

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Opinion of the Court, by MONELL, Ch. J.

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and seventy cents, as the amount alleged to have been paid the contractor for grading the street; that six thousand six hundred and sixty six dollars and fifty cents, parcel of such sum is in excess of the contract price of the work of grading; and that a suit at law is now pending, brought by the said town of Morrisania against the said contractor or his sureties, to recover said last mentioned sum, on the ground that the same was an illegal and overpayment.

That the reason the last mentioned sum is illegal is, that the contract price was at and after the rate of forty-five cents per cubic yard for grading, and the contractor was paid at and after the rate of seventy cents per cubic yard, making an illegal and fraudulent payment of twenty-five cents per cubic yard.

A preliminary injunction was granted, with an order to show cause why it should not be continued during the pendency of the action.

Upon the return of the order to show cause, the injunction was dissolved, and the motion to continue denied.

The plaintiff appealed.

*Johnson & Ward*, for the appellants, and *Irving Ward*, of counsel.

*E. Delafeld Smith*, counsel to the corporation, for the respondents, and *William Barnes*, of counsel.

BY THE COURT.—MONELL, Ch. J.—The court at special term is understood to have held, that upon the pleadings the plaintiff had shown a case, for the equitable interposition of the court, to restrain the sale, if not prevented by the provisions of the act of the legislature of 1874 (*Sess. Laws of 1874*, ch. 312), which was in effect when the action was commenced. But the court decided that such act was a complete bar to the maintenance of the action.

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Opinion of the Court, by MONELL, Ch. J.

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It is now insisted, first: that the subject of the action is not covered by or included in the provisions of the act; or, second, if it is, that the act is void.

The act of 1874 is mainly amendatory of the act of 1858 (*Sess. Laws*, ch. 338), relating to frauds in assessments, which authorized a judge of the supreme court at special term, to vacate assessments upon the allegation and proof of "any fraud or legal irregularity" thereon.

The amendment by the act of 1874, struck out the words "or legal irregularity," and inserted "*or substantial error*;" so that the grounds for proceeding now are "fraud or substantial error."

And a further amendment provided that "hereafter no suit or action in the nature of a bill in equity or otherwise, shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but the owners of property shall hereafter be confined to their remedies in such cases to the proceedings under the act hereby amended."

The nominal or specific relief the plaintiff seeks in this action, is to restrain the sale of his property by the corporation, and the collection of the assessment by any other mode or process; and such relief, it is alleged, is not provided for by the act of 1858.

But to entitle the plaintiff to such relief, facts must be established invalidating the assessment; and the court must adjudge that some fraud or substantial error has been committed, which should and does render the assessment void. Fraud is one of the grounds, and the plaintiff has alleged it; and he claims several substantial errors, as other reasons for avoiding the assessment, and as justifying the restraint. These are the grounds of relief specified in the act of 1858, as amended, and cover the case made by the plaintiff.

Under that act, the court is empowered to order an assessment to be vacated and canceled, which is sub-

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Opinion of the Court, by MONELL, Ch. J.

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stantially the same relief as restraining a sale under it, and is founded upon the same or similar allegations of fraud, or of substantial error.

It is clear, therefore, that the plaintiff could obtain as adequate relief under the amended act of 1858 as he could by his action in this court. Fraud, which is one of his grounds of attack, can be fully investigated under that statute; and if found to exist, will authorize a vacation and cancelment of the assessment; and the words "substantial error" are comprehensive, and include any objection which is not merely an irregularity, or of a merely technical nature. And the latter two objections would fare no better in a court of equity than they do under the statute.

The vacation and cancelment of an assessment is all the relief the owner of property can desire. It necessarily restrains a sale or other proceeding for its collection, and removes the cloud upon the title, and these are the only results which the plaintiff claims.

But it is insisted that the act of 1874 is in conflict with the provision of the constitution (art. 6, § 12) which continued the superior court, with its then *powers and jurisdiction*.

It will not be contended, I think, that the legislature can take from this court any of the jurisdiction which it possessed at the time of the adoption of the judiciary article of the constitution in 1870. The jurisdiction was then so firmly fixed, that the court is removed from any interference by the legislature.

By this I must be understood to mean, that the legislature is powerless, by any express enactment or by any indirection, to abolish or repeal any statute which expressly or impliedly confers a jurisdiction upon this court. Prior to the constitutional article, this court had been the creation of the legislature, and its jurisdiction and powers were conferred and regulated by the legislature. It had no general jurisdiction, and

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Opinion of the Court, by MONELL, Ch. J.

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could exercise its functions as a court, only within the letter of some statute, in which its jurisdiction was defined.

But with such jurisdiction as the legislature had from time to time given to it, and which existed on January 1, 1870, it was made a constitutional court, with the "powers and jurisdiction" it then had, which placed it beyond the power of legislative interference. And such I understand to be the view of the court of appeals in *Landers v. Staten Island R. R. Co.* (14 *Abb. Pr. N. S.* 346), where they say (p. 350): "Whatever jurisdiction those courts possessed, whether territorially or otherwise, is by the constitution put beyond legislative discretion, that is, the jurisdiction before statutory, is now exercised under the constitution."

It is true that this court, at the adoption of the constitution, possessed sufficient equity jurisdiction, previously given it by statute, which would have brought the plaintiff's case within its powers. And except for the act of 1874, this court could have entertained the action and granted the relief sought.

If, therefore, the construction could be given to the act, of depriving the court of a previously conferred jurisdiction, it would be open to the constitutional objection.

But I do not understand such to be a correct construction of the act.

It merely affects the *remedy*; and the legislature has always, and rightfully, assumed the power to change the forms of proceedings, and restricting them to prescribed tribunals. But merely affecting the remedy can not be claimed, except by the merest indirection, to be an interference with previously acquired jurisdictions.

It was not intended, in constitutionalizing this court, to so fix its jurisdiction that the legislature could not change the forms of procedure, or limit litigation to

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certain other tribunals. Hence, any general laws affecting the mode of obtaining a remedy, and which apply to all courts of similar or co-ordinate jurisdiction, can not, in the sense intended by the constitution, be construed into an infringement of a constitutional power. Therefore, any general amendments of the code of procedure, which changes the forms or methods of proceedings in actions, or special proceedings, and which are made applicable to all the courts named in it, are within the constitutional power of the legislature.

This court certainly can not claim any greater exemption from legislative interference than the supreme court. By the same article of the constitution, it is provided, that "there shall be the existing *supreme court*, with *general jurisdiction* in law and equity." By that provision, that court is as firmly fixed in its law and equity jurisdiction as this or any of the other courts mentioned in the article; and the act in question as effectually deprives the supreme court of its jurisdiction in the plaintiff's case, as, it is contended, it deprives this court.

It was not intended, by continuing the existing courts with such jurisdiction as they then had, to destroy or curtail the power of the legislature over the forms of proceeding, or the remedies furnished to parties; and any legislation, which has no other effect than to limit the remedy, is valid.

This question received an *incidental* affirmation by the court of appeals in *Lennon v. Mayor, &c.* (55 *N. Y.* 361). The objection was not presented in that case as it is in this; but the court had under examination the act of 1872, which deprives any court of power to vacate an assessment for any of the causes therein enumerated; and the objection was, not that it deprived the court of any of its jurisdiction, but rather that as its effect was to validate a past assessment, it

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Opinion of the Court, by MONELL, Ch. J.

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was taking private property within the constitutional inhibition. The court, however, without examining the objection as thus presented, say that the provision that no assessment shall be vacated, &c., "deprived the court of the power to grant that portion of the relief demanded in the complaint, which was refused. *It was competent for the legislature to deprive the courts of the power to give this relief and the parties of the benefit of this form of remedy.* And although inconvenient to an owner to have an apparent lien upon his land, *yet he has no such constitutional right to the aid of a court of equity to remove such cloud upon his title, that the legislature may not deprive him of that particular remedy.*"

These remarks were made in a case arising in the court of common pleas of this city, a court possessing the same powers and jurisdiction as this court; and although the question does not seem to have been very fully examined, it must be regarded by us as a strong and decisive annunciation of the views of the court upon the subject of legislative power over remedies and modes of procedure.

As there is nothing in the act which deprives this court of any of its secured jurisdiction, but its effect being merely upon the remedy of the plaintiff, it must be declared to be a valid law. And the court below was correct in holding that the plaintiffs' suit can not be maintained.

The order appealed from must be affirmed, with costs.

VAN VORST, J., concurred.

Statement of the Case.

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THE AMERICAN CORRUGATED IRON COMPANY, PLAINTIFF, v. HENRY EISNER, DEFENDANT AND APPELLANT, AND ELIZABETH PHELAN, EXECUTRIX, &CO., AND JOHN J. O'BRIEN, DEFENDANTS AND RESPONDENTS.

BUILDING CONTRACTS. MECHANIC'S LIEN.

Any or all of the several provisions of a written contract can be waived by parol.

A party may always surrender the benefit or advantage of a provision in his favor, and parties may by a new and independent agreement contract for work or materials, other and different from such as may be specified in the original contract, and this may be done *by parol*. Where the original contract provided for certain certificates from the architect, &c., as to the work being done and the materials being furnished, &c., &c., agreeably to the contract, such provisions will not apply to or affect, extra work done in accordance with a subsequent parol agreement, unless such extra work is made subject thereto by an express agreement.

The findings of a referee upon conflicting evidence should not be disturbed, and especially so, when the contradictions are irreconcilable, and one side or the other must be disregarded.

His findings of fact, like the verdict of a jury, will not be disturbed by an appellate court, unless unsupported by, or very clearly against, the weight of evidence.

Before MONELL, Ch. J., and FREEDMAN, J.

*Decided March 1, 1875.*

Appeal from a judgment entered upon the report of a referee.

The action was to foreclose a mechanic's lien on real property in this city.

Henry Eisner, the appellant, was the owner of the premises, and the defendants Phelan, Foley, and



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O'Brien were lienors of the same property, between which lienors and the owner, the contest arose.

The action being at issue between the owner and lienors, it was referred to a referee to hear and determine.

The referee found as facts :—

That Eisner was the owner of the property.

That in pursuance of contracts, or directions made or given by Eisner, O'Brien performed certain work, and furnished materials therefor, in the construction of a building on the premises.

That the work and materials "so performed and furnished, *the same being all extra work*, was of the value," &c.

That in due time O'Brien duly filed a mechanic's lien on said property.

That William Phelan (now represented by his executrix) furnished stone to said O'Brien, which he used in the construction of said building, and for which said Phelan duly filed a mechanic's lien.

That there remained due from Eisner to O'Brien under their contracts, the sum of two thousand eight hundred and nineteen dollars and forty-four cents.

And as conclusions of law :—

That for the sum aforesaid, O'Brien was entitled to judgment against Eisner; and that out of that sum the executrix of Phelan, was entitled to be paid the amount of his lien.

The judgment directed a sale of the premises, and the payment out of the proceeds of the amounts due to O'Brien and Phelan respectively.

From the judgment Eisner appealed.

The contract between Eisner and O'Brien, provided for the payments to be made by the former, as follows :—

"\$1,500, when foundation was laid; \$1,500, when stable was built; \$2,000, when completely finished;

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Statement of the Case.

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provided that in each of the said cases a certificate be obtained by the party of the second part (O'Brien) and signed by the said architect, and also a certificate of the county clerk that there are no liens, attachments or other incumbrance on said premises under the above agreement."

It was further provided that "should any dispute arise respecting the true value of the extra work, or works omitted, the same shall be valued by two competent persons, one employed by the owner and the other by the contractor, and those two shall have power to name an umpire whose decision shall be binding on all parties."

The contract also contained the following:

"Should the owner at any time during the progress of the said building request any alteration, deviation, additions, or omissions from the said contract, he shall be at liberty to do so, and the same shall in no way effect or make void the contract, but will be added or deducted from the amount of the contract as the case may be, by a fair and reasonable valuation, but nothing shall be allowed or considered as extra but such as shall be ordered by the owner, in writing, with the price to be paid therefor thereon written."

The referee upon the settlement of the case made the following additional findings of fact:

That there has been no demand proved for any arbitration.

That when the defendant Eisner ordered the extra, or additional work mentioned in the referee's report herein, he promised to O'Brien to pay the value of it, and did not tender any written order for it, or offer to make such an order, and that all such extra or additional work was done by Eisner's direction and consent, and under his own supervision, and that he has not proved any demand for any arbitration in relation thereto.

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Opinion of the Court, by MONELL, Ch. J.

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That the total value of the said extra work was the price of two thousand nine hundred and seventy dollars and forty-nine cents, and that no part of said sum has been paid to said O'Brien.

And as matter of law :

That the architect's and clerk's certificates and arbitration did not apply to the extra work mentioned in the foregoing finding.

That the provisions in the contract as to extra work were provisions in favor of Eisner, and might be waived by him by parol at any time, and that the actions and directions of Eisner, as to said additional or extra work and materials, constituted a perfect waiver of all said provisions.

The defendant Eisner duly excepted.

The referee refused to find, that a portion of the work allowed for in the report was work done under the contract between O'Brien and Eisner, or that there was no waiver of the contract on the part of Eisner.

But he did find, that at the time of the commencement of the action there were prior liens upon the premises for work or materials upon said building which were valid and subsisting liens; and that no certificate from the county clerk that there were no liens, was procured by O'Brien, before the commencement of the action.

The defendant Eisner also excepted to the refusal of the referee.

*J. M. Smith*, for appellant.

*F. H. Man*, for respondents.

BY THE COURT.—MONELL, Ch. J.—Without examining at any length the other questions discussed by the appellant's counsel, the decision of the referee may be sustained, if his finding of fact that the work

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Opinion of the Court, by MONELL, Ch. J.

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in question was extra or additional work, and that the provisions in the contract in respect to it was waived, is supported by the evidence.

It is quite clear that the provisions in regard to the architect's and clerk's certificates, relate only to the payments to be made upon the contract as therein specified, and have no relation whatever to any extra or additional work, outside of the contract, which might be ordered by the owner. For the protection and satisfaction of the owner, he had a right to insist that his contractor, as a condition precedent to payment, should procure the certificate of the architect, that the work had been done in conformity with the contract and specifications; and also the certificate of the county clerk, that there were no liens upon the premises under the contract. But the parties did not, in terms, require any such certificates in respect to any extra or additional work that might be done; and such certificates would, probably, be wholly inapplicable to that class of work. Nevertheless, the owner might have made it a part of his contract that, as a condition precedent to payment for extra work, similar certificates should be furnished. But he did not do so, and merely required that the order for extra work should be in writing.

The referee was correct in his conclusion of law, that any or all of these provisions could be waived by parol. The parties were not bound absolutely, and a party may always surrender the benefit or advantage of a provision in his favor, if it is voluntarily done, and there is neither mistake nor fraud. So parties may, by a new and independent agreement, contract for work or materials, other or different from such as is specified in their contract, and, ordinarily, such extra work will not be affected by the covenants or stipulations in the contract. It, of course, can be made to be subject to such covenants, by an express agreement to that effect, but the obligation can not be implied.

The referee has found that the work which was the subject of the lien was extra or additional work ; that the owner did not tender or offer to make a written order for it, but that it was done by his direction and consent, and under his supervision ; and that he did not demand an arbitration in respect to the value of it.

Those findings, if correct, are conclusive of the right of the lienors to recover.

The right of the owner to give a written order for the extra or additional work, and to insist at all times, that without it he should not be liable, was a provision in his favor. The builder had no interest in or right over it, and it is doubtful if he could have insisted upon it. But being wholly within the power of the owner, he could, and as the referee has found, did waive it ; and therefore he can not now insist that the extra or additional work was not ordered in the manner prescribed by the contract.

The provision in the contract in respect to the mode of ascertaining the value of any extra or additional work, was for the benefit of both parties, and either could, probably, have insisted upon resorting to it, to settle these differences. But the referee has found, and it is not disputed, that neither party demanded the arbitration, so that neither can now claim any advantage of objection from it.

The evidence before the referee upon the several questions,—of the character of the work, the manner in which it was ordered, and the waiver under the contract which upon his finding justify his judgment, was contradictory and disputed. On the one, side the testimony of the contractor supported and corroborated by two witnesses ; and upon the other side, the testimony of the appellant Eisner, also supported and corroborated by two witnesses. There was a direct antagonism in their evidence, and it became a question which the referee would believe. He had the witnesses

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Opinion of the Court, by MONELL, Ch. J.

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before him, he saw them and heard them testify, and had such other opportunities as the trial afforded, of judging of the credit which should be given to the one or the other. And being satisfied in his own judgment, he accepted the evidence of the contracts and discredited that of the owner.

It is very clear that a judge would not have been authorized to have taken the case from a jury, if it had been before one, and it follows, as equally clear, that their verdict could not properly have been disturbed.

And the same effect must be given to the findings of a referee upon conflicting evidence, and especially is this so, when the contradictions are irreconcilable, and one side or the other must be discredited.

A referee is better able to decide upon the credit of witnesses, than a court sitting *in banc* can be ; and it is for that reason, that upon appeal his findings of fact, like the verdict of a jury, will not be disturbed, except it be unsupported by, or very clearly against, the weight of the evidence.

But I am not aware of any case where its determination rested solely upon the credit of witnesses, that the appellate court has interfered with the result.

The judgment should be affirmed with costs.

FREEDMAN, J., concurred.

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Statement of the case.

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SETH W. HALE, PLAINTIFF AND APPELLANT, v.  
THE OMAHA NATIONAL BANK, DEFENDANT  
AND RESPONDENT.

I. ACTIONS—DISTINCTIONS BETWEEN NOT ABOLISHED.

1. TRESPASS, TROVER, AND SPECIAL ACTIONS ON THE CASE.

1. There are *intrinsic differences* between special actions on the case, and trespass or trover which are *not abolished by the code*.

II. CHATTEL MORTGAGES.

1. TRESPASS OR TROVER AGAINST MORTGAGEE.

1. Where a mortgagee, whose right to possession has become perfected under the mortgage, obtains possession in a lawful manner, and sells the property generally without taking any notice of a prior lien or mortgage, he is *not liable in trespass or trover at the suit of the mortgagor or the prior lienor or mortgagee*.

III. EQUITABLE LIEN.

1. WHEN IT DOES NOT EXIST.

a. *Lessor or lessee*.

1. Where the lease, for the purpose of giving a security for the rent, contains this clause, "A lien shall be given by the said lessee to the said lessor to secure the payment thereof" (that is of the rent) "on all the furniture that shall be placed in said hotel by said lessee," *an equitable lien is not raised*.

2. *Bona fide subsequent incumbrancer*.

a. *Takes free of an equitable lien*.

1. Who is *bona fide*.

- a. One who, without notice of the lien, takes a mortgage to secure a *prior indebtedness* due him by the mortgagor, and by the mortgage *extends the time of payment*, is a *bona fide incumbrancer* for value.

IV. INSTRUMENTS—CONSTRUCTION OF.

1. SUBJECT CLAUSE, EFFECT OF.

1. Where, by the subject clause, property is transferred, subject only to certain specified liens,  
*there is a strong inference*  
that all other liens which may be held by the transferor  
*are waived*.

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Statement of the Case.

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Before FREEDMAN, CURTIS, and SPEIR, JJ.

*Decided March 1, 1875.*

The action is in trover to recover the value of certain household furniture. It was tried by the court without a jury, and judgment given for the defendant. The plaintiff appeals from that judgment.

The findings of fact cover the case, and are substantially as follows:

The firm of Cozzens & Bettman, on June 22, 1867, leased from the Credit Foncier of America, a hotel, in the city of Omaha, in writing. The lease contained this clause following the covenant to pay rent: "and a *lien to be given* by said lessees to said lessors, to secure the payment thereof as hereinbefore stipulated, on all the furniture which shall be placed in said hotel by said lessees."

On July 22, 1867, the Credit Foncier assigned that lease to the plaintiff.

On October 14, 1867, Cozzens & Co. executed to the plaintiff a mortgage on certain furniture which had been placed in the hotel by them to secure some six thousand dollars, five hundred dollars thereof in six months from date, the balance in one year.

On March 10, 1868, Cozzens & Co. executed a chattel mortgage on the same furniture to the defendant, to secure five thousand nine hundred dollars, in sixty days, for which a promissory note was then executed.

On April 28, 1868, the defendant brought replevin against Cozzens & Co. on their mortgage to recover the furniture, and on July 20, 1868, obtained a judgment awarding it the right of possession thereof; the possession having already been delivered by the sheriff under mesne process.

On September 24, 1868, plaintiff assigned his chattel mortgage to the defendant, subject to proceedings in bankruptcy then pending against Cozzens & Co.



## Appellant's points.

When the defendant took its own second mortgage from Cozzens & Co., it had no knowledge or notice of the lease, or of the lien clause therein.

On November 20, 1868, the defendant sold the furniture under the two mortgages ; but it does not appear whether the sale was in one lot or in parcels to one or more purchasers. At the sale defendant sold only the rights of Cozzens & Co. and of itself in the property, and did not sell any interest of the plaintiff, whatever that was. At the sale the property brought its full value, ten thousand one hundred and seventeen dollars and eighty-one cents.

*Bell, Bartlett and Wilson*, attorneys, and *Edward J. Bartlett*, of counsel for appellant, urged :—I. It is submitted that the clause in the lease of plaintiff created an equitable lien on the furniture placed in the hotel, as against Cozzens & Co., the lessees, and all persons asserting a claim thereto under them, either with notice of the lien, or not being *bona fide* mortgagees or purchasers in good faith (1 *Story Eq. Jur.* § 64 g. ; 4 *Bouv. Inst.* n. 3729 ; 1 *Fonblanque Eq.* b. 1, ch. 6, § 9, note ; 49 *N. Y.* 633 ; *Hathaway v. Payne*, 34 *Id.* 103 ; *Champion v. Brown*, 6 *Johns. Ch.* 398 ; *Griffith v. Beecher*, 10 *Barb.* 432 ; *Moore v. Barrows*, 34 *Id.* 173 ; *Smith v. Gage*, 41 *Id.* 60 ; *Merithew v. Andrews*, 44 *Id.* 200 ; 3 *Rev. Stat.* 5 ed. 199, § 78 ; *Craig v. Leslie*, 3 *Wheat.* 578 ; *Wright v. Wright*, 1 *Ves.* 409, 410, 411 ; *Beekley v. Newland*, 2 *P. Wms.* 182 ; *Hobson v. Trevor*, *Id.* 191 ; *Langhton v. Horton*, 1 *Hare*, 549 ; *Case of Ship Warre*, 8 *Price*, 269, n. ; *Curtis v. Auber*, 1 *Jac. & W.* 506 ; *Mitchell v. Winslow*, 2 *Story*, 639 ; 2 *Story Eq. Jur.* § 1231, and cases cited ; *Cross on Liens*, ch. 12, p. 187, 188, 191, 192 ; *Prebble v. Boghurst*, 1 *Swans.* 309 ; *Needham v. Smith*, 4 *Russ.* 318 ; *Randall v. Willes*, 5 *Ves.* 262, 274–5 ; *Simond v. Hibbert* 1 *Russ. & M.* 719 ; *Seymour v. Canandaigua &*

## Appellant's points.

Niagara Falls R. R. Co., 25 *Barb.* 284; Wood v. Lessee, 29 *Id.* 145; Field v. Mayor of New York, 2 *Seld.* 179; Stover v. Eyclesheimer, 3 *Keyes*, 620; Union M'f'g Co. v. Lounsbury, 41 *N. Y.* 374; Hall v. City of Buffalo, 1 *Keyes*, 199; *Story Eq. Jur.* §§ 1040, 1040 B, 1055; Matter of Howe, 1 *Paige*, 129; White v. Carpenter, 2 *Id.* 266; Finch v. Earl of Winchelsea, 1 *P. Wms.* 282; Burn v. Burn, 3 *Ves. Jun.* 576; Delaire v. Keenan, 3 *Dess.* [*S. C.*] 74; Foster v. Foust, 2 *Serg. & R.* 11; 2 *Lead. Cas. in Eq.* [*White & Tudor Fourth Eng. Ed.* 1872] 772; Wellsbey v. Wellsbey, 4 *Mylne & C.* 561; Metcalf v. Archbishop of York, 1 *Id.* 547; Lyde v. Myner, 4 *Sim.* 504; Tooke v. Hastings, 2 *Vern.* 9).

II. It is submitted that the defendant is not a *bona fide* mortgagee under either of the chattel mortgages on the furniture in the hotel. Judge ALLEN remarks in *Weaver v. Barden* (49 *N. Y.* 293): "It is generally admitted that the mere existence of a precedent debt is not a sufficient consideration to support a conveyance as against prior equities but in some States it is held that when made in absolute payment and satisfaction of an antecedent debt, the purchase will be regarded as a purchase for value. But that is not the rule in this State (*Dikerson v. Tillinghast*, 4 *Paige*, 215)." (*Coddington v. Bay*, 20 *Johns.* 637; *Van Heusen v. Radcliff*, 17 *N. Y.* 583; *Stalker v. McDonald*, 6 *Hill*, 93; *Young v. Lee*, 12 *N. Y.* 551; *Farrington v. Frankfort Bank*, 24 *Barb.* 554, and cases cited; *Boyd v. Cummings*, 17 *N. Y.* 101; *Essex County Bank v. Russell*, 29 *Id.* 673; *Brown v. Leavitt*, 31 *Id.* 113; *Cary v. White*, 52 *Id.* 138; *Bank of New York v. Vanderhorst*, 32 *Id.* 553; *Payn v. Cutler*, 13 *Wend.* 605; *Cryslar v. Renois*, 43 *N. Y.* 209; *Lawrence v. Clark*, 36 *Id.* 128; *United States v. Hodge*, 6 *How. U. S.* 279; *Bangs v. Strong*, 10 *Paige*, 11, citing several cases at page 16; *Neimceweiz v. Gahn*, 3 *Paige*, 614, affirmed 11

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Appellant's points.

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*Wend.* 312; 1 *Parsons on Notes & Bills*, 224; *Wood v. Robinson*, 22 *N. Y.* 564; *Atlantic Nat. Bank v. Franklin*, 55 *Id.* 238; *Bell v. Banks*, 3 *M. & G.* 258; *Elwood v. Diefendorf*, 5 *Barb.* 398; *Platt v. Coman*, 37 *N. Y.* 440; *Mech. & F. Bank of Albany v. Wixon*, 42 *Id.* 438; *Jennison v. Stafford*, 1 *Cush.* 168; *Howell v. Jones*, 1 *C.M. & R.* 97; *Fellows v. Prentiss*, 3 *Denio*, 512; *Ayrault v. McQueen*, 32 *Barb.* 305; *Cardwell v. Hicks*, 37 *Id.* 458; *Traders B'k of Rochester v. Bradner*, 43 *Id.* 379; *Mickles v. Colvin*, 4 *Id.* 304; *Park Bank v. Watson*, 42 *N. Y.* 490; *Brown v. Leavitt*, 31 *Id.* 113; *Chrysler v. Renois*, 43 *Id.* 209; *Boyd v. Cummings*, 17 *Id.* 101).

III. *The sale by plaintiff to defendant of his first mortgage on the furniture did not in any way prejudice his rights under the lien of the lease.* The learned judge at Special Term thus comments on this clause: "The assignment was made subject only to the proceedings then pending in bankruptcy against the mortgagors, such single exception would appear to exclude any other claim." It is submitted, with all respect, that this clause in the assignment will bear no such construction. Here was a party selling a mortgage and covenanting that the whole amount was due. The mortgagors were in bankruptcy, and, for aught he knew, had been discharged from all their debts. He, therefore, very properly draws his covenant subject to the proceeding in bankruptcy. It is submitted that it is never the case to recite prior liens in assignments of younger ones, and the covenant as to whole amount being due would be true if there were a dozen prior existing liens not referred to and belonging to the assignor.

IV. *Cozzens & Co. became in equity, under the law of constructive or implied trusts, the trustees of the plaintiff, and were, as such, the custodians of the said furniture, subject to the equitable lien of the plaintiff*

## Appellant's points.

for unpaid rent; and all persons receiving title to said property, with actual notice of said lien, although paying a valuable consideration therefor, or without actual notice of said lien if received to secure an antecedent indebtedness, or without parting with present value, took the same from said trustees subject to said equitable lien, and said takers are construed in equity to be themselves trustees, and liable as such to the same extent as the trustees from whom they took it (*Perry on Trusts*, 2d Ed. §§ 217, 232, 241, 828; *Mackreth v. Symmons*, 15 *Ves.* 329; Same case, 1 *Lead. Cas. in Eq.*, 336; *Lemon v. Whitley*, 4 *Rus.* 423; *Chapman v. Tanner*, 1 *Vern.* 267; *Blackburn v. Greyson*, 1 *Brown Ch.* 428; *Burgess v. Wheat*, 1 *Eden*, 211; *Story Eq. Jur.* § 1217; *Sugden on Vendors*, [8th Am. Ed.], note K. margin, page 680; *Perry on Trusts*, 2d Ed. §§ 67, 82, 122, 217, 241, 843; *Currie v. White*, 45 *N. Y.* 822; *Pye v. George*, 1 *P. Wms.* 128; *Mansell v. Mansell*, 2 *P. Wm.* 678; *Kennedy v. Daly*, 1 *Schol. and Lef.* 355; *Crofton v. Ormsby*, 2 *Id.* 583; *Murray v. Ballou*, 1 *Jh. Ch.* 566; *Van Allen v. American Nat'l. Bank*, 52, *N. Y.* 1, and case cited; *Perry on Trusts*, § 843; *Denton v. Davies*, 18 *Vesey*, 504; *Oliver v. Piatt*, 3 *How. U. S.* 333; *Freeman v. Cook*, 6 *Ired. Eq. N. C.* 379; *Roberts v. Mansfield*, 38 *Geor.* 458; *Norman v. Cunningham*, 5 *Grat. [Va.]* 72; *Flagg v. Mann*, 3 *Sumn. U. S.* 84; *Howkins v. Howkins*, 1 *Drewry & S.* 75; *Hill on Trustees*, 522). The Supreme Court of the United States in 1871, in the case of *Kitchen v. Bedford* (11 *Wallace* 413) went so far as to hold the trustee, and those claiming under him, liable in *trover* at the suit of the *cestui que trust*.

V. The holder of an equitable lien has his remedy against all parties who interfere with or defeat the same, having notice thereof, or standing in the position of mere volunteers under the party creating the lien (*Goulet v. Asseler*, 22 *N. Y.* 225; *Hull v. Carnley*, 1

## Respondent's points.

*Kern*. 501 ; 17 *N. Y.* 202 ; *Manning v. Monahan*, 28 *Id.* 585 ; *Hathway v. Brayman*, 42 *Id.* 322, 7 *Term R.* 9).

VI. The disposition of this case in the court of appeals did not leave it *res adjudicata* under the opinion of the general term as to the first cause of action set forth in the complaint, as was claimed by defendant at the trial. (1.) The court of appeals did not pass on the first cause of action ; they were acting under the familiar rule that when the demurrer is general it must be entirely sustained or fall together (*Peabody v. Wash. Mut. Ins. Co.*, 20 *Barb.* 342 ; *Cooper v. Classon*, 1 *Code R. N. S.* 347 ; *People v. Mayor*, 17 *How. Pr.* 57 ; *Wait Ferguson*, 14 *Abb. Pr.* 379). A defendant, where the complaint contains several causes of action, is at liberty to interpose a separate demurrer to each cause, and if he fails to do so, the court will overrule the demurrer on finding one good cause of action without looking further (*Butler v. Wood*, 10 *How. Pr.* 222 ; *Martin v. Mattison*, 8 *Abb. Pr.* 3 ; *Harrison v. Hogg*, 2 *Vesey Jun.* 323 ; *Jones v. Frost*, 3 *Mod.* 1 ; 1 *Barb. Ch. Pr.* 107 ; *Code*, § 145 ; *Jaques v. Morris*, 2 *E. D. Smith*, 639 ; *Sheldon v. Hoy*, 11 *How. Pr.* 11 ; *Roeder v. Ormsby*, 22 *Id.* 270). If a complaint charges a conversion of money of the plaintiff by the defendant, and claims damages, and the evidence fails to show a conversion, if it appears that the defendant has received the money in question to the plaintiff's use, the plaintiff may under the code recover as for money received (*Gordon v. Hostetter*, 37 *N. Y.* 99 ; *Byxbie v. Wood*, 24 *Id.* 607 ; *Wright v. Hooker*, 10 *Id.* 51 ; *Cobb v. Dows*, 10 *Id.* 335 ; *Eldridge v. Adams*, 54 *Barb.* 417 ; *Colton v. Jones*, 7 *Robt.* 164).

*E. R. Meade*, attorney, and *Wheeler H. Peckham*, of counsel for respondent, urged :—I. Conceding, for the argument, that plaintiff had legal title, instead of a covenant for a lien, under his lease—yet he can not re

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Respondents' points.

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cover. It is well settled that the seizure and sale of chattels under a junior encumbrance is no wrong to the holder of a prior lien, though the prior lien be a full mortgage (Hull v. Carnly, 17 N. Y. 202; Goulet v. Asseler, 22 Id. 225; Manning v. Monaghan, 23 Id. 545, where in the opinion, Judge Comstock reasserts the principles of his dissenting opinion in Goulet v. Asseler; Manning v. Monaghan, 28 N. Y. 585, which again overrules the principles of Judge Comstock; Hathaway v. Brayman, 42 N. Y. 322; Trust v. Pierson, 1 Hill. 292).

II. Defendant took its second mortgage without notice of plaintiff's equitable claim under the lease, and having given time and some money as consideration for said second mortgage, became a *bona fide* holder for value, and held in priority to plaintiff's claim under the lease. As to value, Bank of Sandusky v. Scoville (24 Wend. 114, 115); Traders' Bank of Rochester v. Bradner (43 Barb. 379), cited and approved 42 N. Y. 438. As to priority, Taylor v. Baldwin (10 Barb. 627).

III. The assignment by plaintiff to defendant of plaintiff's mortgage, gave defendant a right prior to that of plaintiff under the lease. (a.) Before that assignment plaintiff had two rights with respect to this property. (1.) A complete legal right under the mortgage. Default had been made in its condition, and the title of the plaintiff had become absolute at law. He could have maintained trespass or replevin. (2.) An inchoate or equitable right under the lease. To perfect it would have required the execution by Cozzens & Co. of the lien covenanted to be made, or the decree of a court on bill filed. (b.) Were either course adopted, the effect would have been to make the lien, given in pursuance of the clause in the lease, a lien subsequent to that of the original mortgage, because subsequent in point of time. To make it a first lien

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Opinion of the Court, by SPEIR, J.

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would have required a special clause in the new lien, contract, or decree. While these two rights were in plaintiff's own hands, they had an equal equity; but one only had a legal character. He then transfers his legal lien, which has also an equal equity. That act gave his transferee priority; for where the equities are equal, the legal title will prevail (1 *Story Eq.* § 642).

IV. The assignment by plaintiff to defendant of the mortgage, subject only to certain bankruptcy proceedings, is a virtual covenant that it is a first lien—“*Expressio unius*,” &c.

V. The decision by the court of appeals does not touch the case as now presented.

VI. Plaintiff cites a number of cases of the enforcement of equitable liens. Such cases go merely to the point that such a bill may be filed against the covenantor, and any person holding under him and having the property, to enforce the lien against the property. *Wellesly v. Wellesly* (4 *Myl. & C.* 561), *Wood v. Lester* (29 *Barb.* 145), *Seymour v. Canada & Niagara Falls R. R.* (25 *Id.* 284), are good illustrations of the cases cited. No case can be found where an action for damages has been maintained against one for enforcing his legal rights against property on which another had even a prior equitable lien.

BY THE COURT.—SPEIR, J.—The complaint is in substance the same as a declaration in trover, under the former system of pleading.

Although the code has abolished all distinctions between the mere forms of action, and every action is now in form a special action on the case, yet in their nature they are essentially dissimilar, marked by intrinsic differences which no law can abolish. In trespass and trover, before the code, the plaintiff recovered, if he recovered at all, upon the ground that he was the owner of the property in controversy. The measure of

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damages, therefore, in all such cases, was the value of the property taken or converted. I think the case, as now presented by the evidence and findings of the learned judge who tried it, was properly decided by him. The defendant's proceedings were simply to enforce its own right against the mortgagors. By the sale, under the chattel mortgage, the defendant sold only the rights of Cozzens & Co., and of itself in the property, and did not sell the plaintiff's interest, if any he had therein.

The following positions respecting actions of this character are perfectly well established :

*First.* That a mortgagor of chattels remaining in possession before default, under a clause entitling him to such possession, has an interest in the property which is the subject of levy and sale on execution against such mortgagor.

*Second.* That although the interest which passed to the purchaser at such sale is only such an interest as the mortgagor had, yet parties promoting the sale are not trespassers if the sale is in general terms, without any notice being taken of the existence of the mortgage. So far as this case is concerned, I think it is covered by these propositions (*Hathaway v. Brayman*, 42 *N. Y.* 322; *Hull v. Carnley*, 17 *Id.* 202; *Goulet v. Asseler*, 22 *Id.* 225; *Fairbanks v. Phelps*, 22 *Pick.* 535).

The defendant removed the property covered by its mortgage from the premises, and while the property was in its possession, under its mortgage, the plaintiff, on September 24, 1868, assigned to the defendant, in consideration of the sum paid by it, the mortgage which had been executed to him by Cozzens & Co. on October 14, 1867. The defendant retained possession of the property under both mortgages, until November 20, 1868, when they sold it at public auction. The sale was made under both mortgages, notice of time and place of sale being published for thirty days in the Omaha newspapers.



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Opinion of the Court, by SPEIR, J.

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The defendant had taken possession of the chattels under its mortgage, on April 28, 1868, in an action against the lessees to recover such possession, and in such action it was adjudged that the defendant, as mortgagee, was entitled to such possession. The sale was therefore lawful, because it was under a decree of the court, and no right or interest of the plaintiff was sold.

The plaintiff's counsel here interposes the objection that, at the time the hotel was furnished, which by the findings appears to have been on or about July 25, 1867, the equitable lien attached, which was prior to the execution of the chattel mortgages. I think the answer to the position is that, strictly speaking, no lien had attached at any time during the proceedings complained of.

"The elementary rule in the interpretation of an agreement, where the terms are not ambiguous or uncertain, excludes all evidence of the language employed by the parties in making the contract, other than is set down in the writing itself." The lessees, after covenanting to pay the rent, as it shall become due, add, "a lien shall be given by the said lessees to the said lessor to secure the payment thereof on all the furniture that shall be placed in said hotel by said lessees."

It is plain the parties contemplated some further and other act to perfect the security. The lease and agreement import a covenant to create a lien upon the property by a proper instrument, when it shall have been put upon the premises by the lessees. As soon as the lessees had furnished the hotel and placed the furniture therein, the lessor could have required of them security in proper form upon the furniture, and had they refused, upon request, to give the lien agreed upon, a specific performance would have been decreed.

No proper instrument was at any time executed by

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Opinion of the Court, by SPEER, J.

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the parties to perfect the lien, nor was any specific performance decreed or instituted for that purpose.

The defendant, by taking its second mortgage without notice of plaintiff's inchoate equitable claim under the lease on the furniture and chattels, to secure the payment of the sum of five thousand nine hundred dollars, theretofore loaned to the lessees, then due and owing, the payment of which by its terms was extended sixty days, containing a covenant that the bank might take possession of the property at its election any time, became a *bona fide* holder for value and held in priority to plaintiff's claim under the lease.

The decision of the Court of Appeals (*Hale v. Bank of Omaha*, 49 N. Y. 626) does not affect the case as now presented. The defendant demurred to the complaint, which contained two counts. The demurrer was general, and there being two distinct and separate counts, it was overruled, the court reversing the judgment on the ground that the second count was good. The learned judge, however, has put a construction upon the true character of the lien contained in the clause in the lease, and is authority on that question.

The fact has been found by the court below, that before the defendant took its mortgage on the 10th of March, 1868, it had no knowledge of the provisions in the lease in plaintiff's favor in respect of the lien to be given by the lessees. An examination of the testimony on that subject justifies the fact as found.

The assignment of the mortgage to the defendant does not import that the same was made subject to any lien in plaintiff's favor, and being made subject *only* to certain bankrupt proceedings is a strong inference that the lien claimed was waived, and that the mortgage assigned was a first lien.

The judgment must be affirmed, with costs.

FREEDMAN and CURTIS, JJ., concurred.

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Statement of the Case.

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**MARY C. PORTER, EXECUTRIX, &c. v. ELEAZER  
PARMLY. .****I. ATTORNEY AND CLIENT.****1. AGREEMENT AS TO COMPENSATION—VALIDITY OF.**

1. An agreement to pay a certain fixed sum is now valid;  
so also is

an agreement making either any compensation, or the amount of it, contingent on success in the action.

- a. Duty of the court to recognize and enforce.*

1. It is its duty to recognize and enforce such agreements when there is no charge of great hardship, extortion, or fraud.

**2. POWER OF COURT ON SUMMARY PROCEEDINGS TO COMPEL PAYMENT BY ATTORNEY TO HIS CLIENT.**

1. *The facts that the taxable costs now belong to the party, and that the attorney and client may now enter into agreements as to compensation, such as above stated, does not abridge or affect the power formerly exercised by the court.*

- a. If the attorney claims under a specific agreement, and the client disputes the existence of the agreement, the court has power to try that question of fact, either on affidavits or the oral examination of witnesses before it, or through the medium of a reference.*

1. Such a disposition of the disputed question of fact does not *conflict with* the constitutional provision as to *trials by jury*.

2. The exercise of the power does not depend on the insolvency of the attorney, nor on the question as to whether his retention of the money, or his claim thereto, is fraudulent or in bad faith.

Before MONELL, Ch. J., and FREEDMAN, J.

*Decided April 5, 1875.*

Appeal by plaintiff's attorney, from an order made in a summary proceeding instituted by her against him.

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Statement of the Case.

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The motion at the special term was made by Mrs. Mary C. Porter, the plaintiff in the action, for an order requiring Randolph W. Townsend, her attorney in the action, to pay to her certain moneys collected and received by him, as such attorney, upon the judgment recovered by her in the action, or to show cause why an attachment should not issue against him.

The plaintiff in her affidavit alleged the retaining of Mr. Townsend as her attorney; the recovery of judgment in the action, and the receipt by him of the total amount thereof, namely thirty-one thousand nine hundred and sixty-three dollars and eighty one cents, and that thereupon he acknowledged satisfaction of the judgment.

The amount received included some two thousand two hundred and fifty dollars taxed costs and extra allowances.

Out of the sum recovered, Mr. Townsend paid the plaintiff the sum of sixteen thousand six hundred and eighty dollars and twenty-two cents, leaving a balance of fifteen thousand two hundred and eighty-three dollars and fifty-nine cents, to be accounted for by him. Out of this sum, the plaintiff in her moving papers, offered to allow to Mr. Townsend, for his costs and counsel fees, the sum of four thousand and seventy-four dollars and twenty-two cents.

On the part of Mr. Townsend, he read the affidavit of Linson D. Fredericks, who stated that the action was originally brought by Giles W. Porter, and that he (Fredericks) was retained by James L. Porter, a son of plaintiff and acting as his agent, to act as the attorney of record. That said James L. Porter informed the deponent that his father would not advance any money or pay any costs or counsel fees in the prosecution of the action, should he be unsuccessful therein, and it was thereupon finally *agreed* between the said James L. Porter and the deponent, that if he, deponent, would

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Statement of the Case.

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prosecute the action and succeed in collecting any money therein, that the deponent should have and retain one-half of the amount so collected, together with all the costs awarded to the plaintiff; and if the deponent was unsuccessful in the action, he was not to be paid anything for his services. That said Fredericks employed Mr. Dyett (Mr. Townsend's partner) as counsel, informing him of the agreement with Porter. Subsequently, Mr. Fredericks agreed to pay to Mr. Dyett, for his services in the event of a recovery in the action, the sum of five thousand dollars, which agreement said James L. Porter assented to. It was thereupon agreed that said Dyett's law firm should be substituted as attorneys of record in the action; that said Fredericks should continue to aid in the prosecution of the action, and the taxable costs should be divided; but his lien for compensation under said agreement should not be impaired or prejudiced by the substitution. James L. Porter was informed of this, and assented to the substitution.

Mr. Townsend was thereupon substituted as the attorney of record.

The existence of any such agreement as to compensation, as alleged by Mr. Townsend, was denied by the plaintiff.

The original plaintiff, Giles W. Porter, having died, the action was continued in the name of his executrix.

After Mr. Townsend had collected the judgment, Fredericks gave him notice, claiming a lien on the money, and forbidding his paying over the same. And subsequently Fredericks assigned to Mr. Townsend's firm his claim against the plaintiff.

Upon the return of the order to show cause, it was objected on the part of Mr. Townsend, that as he claimed compensation under the special agreement made with Fredericks, the claim under which had been assigned to him, the court could not entertain a sum-

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Appellant's Points.

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mary application to compel the attorney to pay the money, and that the only remedy was by action.

The court, however, overruled the objection, entertained the motion, and sent it to a referee to ascertain and report the value of the professional services rendered by Mr. Townsend and his law firm, in the action; and also whether any and what agreement of any kind was made between Fredericks, and the original plaintiff, or James L. Porter, as his agent, as to the rate or amount of the compensation of said Fredericks for his services as plaintiff's attorney in the action.

Mr. Townsend objected to the reference, and also objected before the referee, claiming that he was entitled to a trial by jury of the disputed question of fact, but the objections were overruled.

The referee found as a fact that no such agreement was made. And after ascertaining the value of the services of Mr. Townsend's firm, the court made an order directing Mr. Townsend to pay the difference between such value, and the sum remaining in his hands, to the plaintiff. Mr. Townsend excepted to the report of the referee, and upon the motion to confirm it again, and further, objected that the court had no power to try the question upon a motion.

Mr. Townsend appealed from the order.

*R. W. Townsend*, appellant, in pro. per. and *A. R. Dyett*, with *A. J. Vanderpoel*, of counsel, urged on the questions discussed and decided by the court:—  
I.—Where as in this case the attorney's claim to the money is made in good faith, the court has no such power or jurisdiction over him; but the client's only remedy is by action, and the attorney has an absolute right to a trial of his claim by a court and jury. No case exists in which the court on a summary application, before or since the code, ever claimed the power to pass on the question of the amount of counsel fees. In

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Appellant's points.

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the few cases where it has exercised such a power, it has done so without objection, and the question of the court's power to do so was not raised. But the courts both in England and America, on summary applications against the attorneys, have constantly ordered a reference to the clerk to tax their costs. This was the clerk's duty. The attorney could not recover his costs without a taxation, and that taxation was conclusive as to items. And if there was a taxation the client could not dispute items before the jury (12 *Johns.* 315; 23 *Wendell*, 456). Consequently the client must show some defense to the entire bill of costs—*e. g.*, negligence. The amount of the costs was not before the constitution referred to, or tried by a court and jury (*Shepherd v. Steele*, 43 *N. Y.* 52; 1 *Sanford*, 669, 569). The only questions they could try were the questions of retainer and that of negligence or some other defense to the whole bill. No such questions ever were tried by the court on any summary application against the attorney. But if the questions, which in this case were summarily tried, can be so tried, why may not the question of negligence which often is necessarily involved in the question of *quantum meruit*? The code has made a radical change in the relation of attorney and client, as to amount and mode of compensation. The amounts fixed by the code for costs are as between party and party alone. They afford no measure of compensation between attorney and client (1 *E. D. Smith*, 318; 11 *Howard*, 452; 16 *Id.* 160; 3 *Sanford*, 762; 1 *Hilton*, 498; 24 *Howard*, 521). They are not even *prima facie* evidence thereof (same cases).

The Court of Appeals has held that the effect of § 303 of the code, has been to remove all disabilities of attorneys to make special agreements for rate of compensation, whether in specific amounts or in a portion of the recovery, and that such agreements are valid and lawful, and will be enforced, and the attorney's lien to

## Appel'ant's points.

their full extent enforced and respected (2 *Sanford*, 141 ; *Forgarty v. Jordan*, 2 *Robt.*, 319, 325 ; *Rooney v. 2nd Av. R. R. Co.*, 18 *N. Y.* 368, 373 ; *Fitch v. Gardner*, 2 *Keyes*, 516); and that an agreement for a part of the recovery constitutes the attorney assignee *pro tanto* of the recovery, and gives him a lien which will be enforced ; and that the attorney is, therefore, in such case, liable under the statute for costs as a party in interest (*Voorhis v. McCartney*, 51 *N. Y.*, 387). The attorney thus has a title to a portion of the judgment. "It is his property." By the Constitution of 1846, no person can be deprived of his property except by due process of law. This has always been held to mean a regular action according to the course of the common law. And by the same Constitution the right of trial by jury in cases in which it has been theretofore—(*i. e.* prior to 1846)—used, shall remain inviolate forever (3 *Kernan*, (13 *N. Y.*,) 378, 427, 450.) This refers to the nature and character of the question. It is of no consequence that the right or right of action has been created subsequently (*Wood v. City of Brooklyn*, 14 *Barb.*, 425). 2 *R. S.* 537, § 19 directs that the court shall try the question of contempt on affidavits or other proof, but did the Legislature intend that such questions as were here tried should be tried wholly or even in part upon affidavits? But no contempt could be committed by the appellant, unless his claim to be entitled to the amount which he did claim was fraudulent, made in bad faith and a mere pretense so as to amount to "misbehavior in office" or "willful violation of duty" (2 *R. S.* 534, § 1 ; 3 *R. S.* 772, and authorities cited *infra*). Whenever the court has been asked to determine any question of fact between the attorney and client properly determinable in an action, the court has uniformly refused to do so, whenever the objection has been taken (*Balsbaugh v. Frazer*, 7 *Harris*, 99 ; *Longworth v. Hardy*, 2 *Disney*, 75 ; And *In re Paschall*, 10 *Wal-*



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*lace* 483 ; Barker's case 49 *N. H.* 197, 198 ; Bryant's case 24 *Id.*, 154 ; Hodson v. Terral (1833), 2 *Dowling Prac. Cases*, 264 ; Beal v. Langstaff, 2 *Wilson*, 371 ; In the matter of Mavis, 2 *Ad. & E.* 582 ; Dagby v. Kentish, 2 *Barn. & Ad.*, 411 ; *In re* Lord, 2 *Scott*, 131 ; *In re*, Phillips, 3 *Jurists*, 470 ; Brazier v. Bryant, 2 *Dowl. P. C.*, 600 ; Meigs v. Binns, 3 *Scott*, 52 ; Comberbach 2 (1724). *In re* Jones, 1 *Chitty*, 651 ; *Merrifield's Law of Att'ys*, 92 ; Duncan v. Yancey, 1 *McCord Rep.*, 149 ; Cullinford v. Warren, 8 *Barn & Cress.*, 220 ; 6 *Mod.*, 16 ; Pitt v. Yalden, 4 *Burr*, 2060 ; Barker v. Butler, 2 *W. Blackstone*, 780). By 2 *R. S.* 534, § 1, courts have power to punish as for contempt, attorneys guilty of "misbehavior in office" and "willful neglect or violation of duty." This is merely declaratory of the common law, (3 *R. S.* 772 ; see also *Bacon's Abridgment*, title "Attorney," *Bouvier's ed.* (1856), and note and cases cited ; Meux v. Lloyd, 2 *C. B. N. S.* 409 ; Hyman v. Washington, 2 *McCord*, 493 ; Haight v. Holcomb, 16 *How Pr.*, 173 ; Fox v. Fox, 24 *How. Pr.*, 409 ; Kennedy v. Brown, 2 *Am. Law. Reg. N. S.* 357 ; Atkins v. *The Eibre Dis. Co.* 10 *Am. Law. Rep. N. S.* 399, 400 ; 1 *Peere Williams*, 223 ; 20 *N. Y.* 226). Prior therefore to the Constitution of 1846, there was no usage to try such questions in any way in England, nor, except the *quantum meruit*, in America, and there that question was tried by a court and jury. But all questions of a similar character were tried in both countries by a court and jury.

II. But if such a disastrous power exists in the court and it can try the questions which it assumed to try in this case, it has no power to examine the parties or witnesses orally (*Meyer v. Lent*, 7 *Abb.* 225) ; and can try such questions on affidavits only, unless it has power to refer them for trial ; and it certainly has no such power. (1) The order of April 22, 1873, was not an order of reference under § 27 of the code. That applies to or-

## Respondent's points.

ders of reference in an action on questions "not arising on the pleadings;" *i. e.*, not affecting the merits—*e. g.*, upon ordinary practice motions to discharge orders of arrest, attachments, &c. Besides, § 271 applies to actions only (*Code*, § 8). This is a special proceeding (*Id.* §§ 2-3). (2) If this was a proceeding for contempt, the only authority which the court had was to order reference to take proof after interrogatories filed (2 *Barb. Ch. Pr.* 277). The court has no common-law power of reference. The authority to refer is entirely statutory, and where the authority does not exist the order of reference is void (*People v. Brennan*, 45 *Barb.* 345; 19 *Wend.* 21; *Id.* 108; 3 *Daly*, 105; *Brink v. Republic Ins. Co.*, 2 *Thomp. & Cook*, 550; *U. S. v. Rathbone*, 2 *Paine's C. C. R.* 578, 583; *Lee v. Tillotson*, 24 *Wend.* 337; *Turner v. Taylor*, 2 *Daly*, 278, 282; *Townsend v. Hendrick*, 40 *How. Pr.* 143, 162, and by counsel *arguendo*, pages 150, 155; *Evans v. Kalbfleisch, Ex'rs*, 36 *N. Y. Sup'r Ct. R.* 450; *Diedrich v. Richly*, 19 *Wend.* 108, 110; *Taylor v. Porter*, 4 *Hall*, 140; *Hough's Manual, Convention* 1846, 67).

*Van Winkle, Candler & Jay*, attorneys, and *Edgar S. Van Winkle*, of counsel, for respondent, in the points discussed and decided by the court, urged:—I. Courts have always had the power to take summary proceedings against their attorneys and other officers for misconduct, violation of duty, extortion, undue influence, or any wrongful proceeding. Such powers were not destroyed or affected by any provision of the Constitution of the United States, or of the State of New York, and the course of summary proceedings used and acted on by the courts before and since the adoption of those constitutions, is embraced and covered by the term "due process of law" (*Merrifield's Law of Attorneys*, London, 1830, p. 90; *Bevins v. Hulme*, 15 *Meeson & Wellsby Ex.*, 88; *Cooley's Constitutional*, 336;

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*Ex parte* Creswell, 5 *Dowl. Pr.* 689; Simes v. Gibbs, 8 *Id.* 310; *In re* Aitken, 4 *B. & A.* 47; Wilmerdings v. Fowler, 14 *Abb., N. S.* 249; Merritt v. Lambert, 10 *Paige.* 352; Wallis v. Lambert, 2 *Denio,* 607; Starr & Wallis v. Vanderheyden, 9 *J. R.* 253; Howell v. Ransom, 11 *Paige,* 538; Barbour and others v. Case, 12 *How.,* 351; Lyon v. Gibbs, 8 *Dow. P. C.* 600; Draper Co. v. Davis, 2 *Atk.,* 295). In *Casborn v. Barsham* (2 *Beav.* 76), the Master of the Rolls declares that "when undue influence is to be inferred from the nature of the transaction, or where the transaction itself is contrary to the policy of the law, I apprehend it is the province of the court to determine the point, and that the question ought not to be sent to the jury." But where the attorney is employed in a matter wholly unconnected with his professional character, the courts will not interfere in a summary way (*Pulling's Law of Attorneys*, 421).

II. These powers are not affected or destroyed by the Code. "The Code in extending the rights of attorneys, by allowing them to contract with their clients as to compensation beyond the allowances given by statute, did not relieve attorneys and their dealings with their clients from that healthful supervision which the courts have ever exercised. The reason for this supervision exists as strongly as ever. Whenever a contract between an attorney and his client enures greatly to the advantage and benefit of the attorney, the court will scrutinize it with great care. In such cases all presumptions are in favor of the client and against the propriety of the transaction, and the burden of proof is upon the attorney to show by extrinsic evidence that all was fair and just, and that his client acted understandingly and with a full knowledge of all the facts connected with the transaction or the subject-matter" (*Haight v. Moore*, 37 *N. Y. Sup'r Ct.*, 161; 2 *Chitty's Gen. Practice*, 338, 33; *Tidd's Pr.*, 87 to

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90, 478; 1 *T. Chitty's Arch.*, 40, 41; *In re Atkins*, 4 *Barn. and Ald.*, 47; *In re Bonuer*, *Id.* 811; *Casborn v. Basham*, 2 *Beav.*, 76).

III.—These powers are not destroyed or affected in any way by any provision of the constitutions of the United States or of the State of New York. The only constitutional provisions that in the remotest degree bear on the case are:

ART. V. of the amendments to the constitution of the United States: "No person shall be deprived of life, liberty, or property, without due process of law."

ART. VII. of same: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

ART. 1, § 1 of constitution of State of New York: "No member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the laws of the land or the judgment of his peers."

ART. 1, § 2.—"The trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever."

ART. 1, § 6.—"No person shall be deprived of life, liberty or property, without due process of law."

ART. VII.—In the amendments to the Constitution of the United States the right of trial by jury applies only to the United States courts (*Lee v. Tillotson*, 24 *Wend.*, 337). It does not apply to the separate States, but to the general government only (*Jackson v. Wood*, 2 *Cow.*, 819, *b*; *Livingston v. Mayor, &c.*, 8 *Wend.*, 85).

As to ART. V. of the amendments to the United States Constitution, and § 6 of Art. 1 of the State Constitution, that no person shall be deprived of life, liberty, or property, without due process of law, it may be observed that due process of law is not confined to

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trial by jury, and probably does not refer to it, as that is provided for by itself; but it means any legal proceeding, or prescribed form, recognized as valid in its nature at the time the constitutional amendments were adopted (See *Wynhamer v. People*, 13 *N. Y.* 378, 425; *Taylor v. Porter*, 4 *Hill*, 140; *White v. White*, 5 *Barb.* 474). Such summary proceedings as the common law recognized, and such as were authorized by statute, prior to the adoption of the bill of rights, may be regarded as due process of law (*Rockwell v. Nearing*, 35 *N. Y.* 302).

Art. 1, § 2, of our State constitution only declares that the right of trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever, and does not affect cases in which such trial has not been heretofore used. The provision did not extend the right of trial by jury, any more that it restricted it. If, then, summary proceedings in cases between attorney and client, had been theretofore used, they could still continue to be used. This word "heretofore" in this clause of the constitution of 1846, means before 1846, and can not to limit its meaning be carried back to 1777, and confined to the cases which at that early period were triable by jury (*Wynhamer v. People*, 13 *N. Y.* 378, 427, 458).

Subd. 3.—There is no force in defendant's objection that the power of summary interference between attorney and client, is limited to cases in which the only question is as to adjustable costs, and does not apply to any other questions as to money between the parties. The agreement may be the very and only thing complained of. The alleged agreement is the very thing the court must look to and inquire about. The great and beneficial power of summary proceedings in regard to transactions between attorney and client can not be nullified by the mere averment of an agreement. A large proportion of the cases in the books of summary proceedings

## Respondent's points.

against attorneys, are cases in which the attorney claimed to hold the moneys by an agreement. All contracts between attorney and client, relating to the subject-matter of the action, or the proceeds of it, are subject to the power of the court (*Pulling's Law of Attorney*, 3d ed. 422; *Howell v. Ramson*, 11 *Paige*, 538; *Hitchins v. Van Brunt*, 5 *Abb. Pr. N. S.* 272).

IV. No agreement will be upheld unless made out by the strongest proof. If there is any doubt on the evidence, the attorney can only recover for the value of his services, and not under the special agreement (*Haight v. Moore*, 37 *N. Y. Sup'r Ct.* 161; *Sanderson v. Glass*, 2 *Atkyns*, 297; *Ward v. Hartpole*, *H. of L.* 3 *Bligh*, 488; *Wells v. Middleton*, 1 *Cox Ch. Cas.* 112; *Goddard v. Carlisle*, *Exch.*, 9 *Price*, 169; *Edwards v. Myrick*, 2 *Hare*, 60; *Brown v. Bulkley*, 1 *McCarter*, 451; *Evans v. Ellis*, 5 *Denio*, 640; *Carter v. Palmer*, 8 *Clark & F.* 657, 706; *Stockton v. Ford*, 11 *How. U. S.* 232 (page 247); *Howell v. Ransom*, 11 *Paige*, 538; *Hitchins v. Van Brunt*, 38 *N. Y.* 635; *Brock v. Barnes*, 40 *Barb.* 521; *Ford v. Harrington*, 16 *N. Y.* 285; *Barrey v. Whitney*, 3 *Sand.* 696; *Brockerson v. Consalies*, 26 *How.* 213; 1793, *Newman v. Paine*, 2 *Ves.* 199; 1801, *Gibson v. Jeyes*, 6 *Id.* 266a). And unless the agreement be for a reasonable compensation it will only be security for such sum as is justly due (*Sanderson v. Glass*, 2 *Atkyns*, 295, 297; *Newman v. Paine*, 2 *Vesey*, 199; *Mason v. Ring*, 1 *Edwards' Ch.* 278; *Nesbit v. Lockman*, 34 *N. Y.* 169; *Howell v. Ransom*, 11 *Paige*, 538; *Brock v. Barnes*, 40 *Barb.* 521; *Merritt v. Lambert*, 10 *Paige*, 352; *Haight v. Moore*, 37 *N. Y. Sup'r Ct.* 161; *Walmsly v. Booth*, *Barb. Ch.* 478; *Drapers Co. v. Davis*, 2 *Atk.* 295).

V. Courts having this inherent power to proceed in a summary manner, and not depending for its possession on any statutory power, on a case duly presented, can proceed to satisfy its conscience in any

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manner (not illegal) which the exercise of a sound discretion may suggest. It may direct a special issue, it may order a general trial by jury, it may refer it to a master or clerk of the court, or to a special referee (Ryan v. Farrell, 4 Dowl. Pr. 582; *Ex parte* Sharpe, 5 Dowl. Pr.; Starr v. Vanderheyden, 9 J. R. 253).

BY THE COURT.—MONELL, Ch. J.—The only question we are asked to examine in this case, is as to the *power* of the court, upon a summary application to determine a disputed question of fact between an attorney and his client, as to the existence of a special agreement, fixing the rate of the former's compensation for prosecuting an action.

It is conceded that if the power exists, the mode adopted in this case is without objection. Upon a motion, properly before the court, it may, to inform its conscience, direct a reference to take the proofs (Marshall v. Meech, 51 N. Y. 140).

No exception to the referee's report is urged; and his finding that no agreement fixing the attorney's compensation existed, made it competent for him under the order, to ascertain the reasonable value; and his report, confirmed by the court, is conclusive.

But the objection was taken at each successive step in the proceeding, that the court, upon a motion, could not try the disputed fact of the existence of the alleged special agreement. And it necessarily follows that, if the power does not exist, the order of reference and all the proceedings under it, as well as the order appealed from, was erroneous.

The power to proceed summarily to compel an attorney to pay over the money of his client, is not questioned in cases where there is no dispute as to the rate or value of the attorney's services, or where the rate is fixed by law, or the value can be determined upon a *quantum meruit*. In such cases the court will ascer

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tain what is a suitable compensation, and direct the balance of the money in the hands of the attorney, to be paid to the client.

And those are the ordinary cases, where in England and this country, the courts proceed upon the principle that attorneys, being officers of the court, should be brought summarily within its authority, for any misconduct, violation of duty, or other wrongful proceeding towards his client.

But it is claimed that the present case differs from those in which the court has usually entertained the proceeding, in this, that the attorney's compensation was fixed by an agreement made between himself and his client, and that the existence of such agreement is in dispute.

That issue, it is insisted, the court can not try on a motion.

The validity of the agreement which formerly would have been void (*Merritt v. Lambert*, 10 *Paige*, 352), is now established by law.

The code (§ 303) provides that the measure of an attorney's compensation may be the subject of an agreement between himself and his client; and such agreements, where there is no charge of great hardship, extortion or fraud (*Barry v. Whitney*, 3 *Sandf.* 696), it is the duty of the court to recognize and enforce.

There is no restriction as to the nature or extent of the agreement, and, therefore, as in this case, the amount of compensation may be made contingent upon success in the action (*Fitch v. Gardner*, 2 *Keyes*, 516; *Hitchings v. Van Brunt*, 38 *N. Y.* 335).

The lien of an attorney which formerly was limited to his taxable costs and counsel fees, is now extended to any sum which may be agreed upon, as the measure of his compensation (*Rooney v. Second Ave. R. R. Co.* 18 *N. Y.* 368; *Marshall v. Meech.*, *ubi sup.*).

The radical change in the law, by which the taxable



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costs, which formerly belonged to the attorney, are now given to the party, and the right now to fix by agreement the attorney's compensation, it is insisted, presents the question of the power of the court over attorneys in a new aspect and relieves it of the force of those cases where the power has ordinarily been applied.

The measure of the attorney's compensation in this case, he says, was fixed by agreement, and the agreement is denied by the plaintiff. Upon that issue the attorney must succeed, or probably fail entirely to recover any compensation whatever. For having alleged a special contract, it is at least doubtful, if having failed to establish it, he then can recover upon a *quantum meruit*.

The only issue in this case is as to the special agreement. The attorney does not claim otherwise, and he insists he has the right of having that issue tried by a jury.

Under recent decisions (*Townsend v. Hendricks*, 40 *How. Pr.* 143; *Kane v. Delano*, 11 *Abb. N. S.* 29; *Welsh v. Darrah*, 52 *N. Y.* 590; *Evans v. Kalbfleisch*, 36 *Sup'r Ct.* 450; *Ross v. Combes*, 37 *Id.* 289), an action which merely involves the existence of an agreement is not referable. The agreement being established the attorney would be entitled to recover the stipulated sum, and no account, long or otherwise, would require to be examined. And such an action the parties have the right to insist should be tried by a jury.

The effect of the constitutional provision "that the trial by jury in all cases, in which it has been heretofore used, shall remain inviolate" (*Art. 1, § 2*), was fully considered in *Townsend v. Hendricks*, *supra*, and in *Kane v. Delano*, *supra*, where it was held that the right of trial by jury continues in all common-law cases, to which there is but one exception, namely: an action on contract requiring the examination of a long account.

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In an action by Mr. Townsend to recover his compensation, or in an action by the plaintiff to recover the money collected by the former, either party would have the right to insist that the question in dispute should be submitted to a jury. If such agreement constituted the whole cause of action or defense, the court, under the cases cited, could not make a compulsory reference, but would be obliged to send it to a jury.

And that absolute right of trial by jury of a cause of action or defense, lies at the foundation of the objection in this case.

This is an initial proceeding as for a contempt in civil actions under the statute (2 R. S. 534), and if the order requiring the payment of the money was lawfully made, the court can lawfully punish the attorney for his disobedience (*Sub. 1 and § 20*). But the statute restricts the power to punish, to cases of disobedience of "any lawful order" made by the court, and does not enlarge its common-law powers.

As yet, the attorney has not been adjudged in contempt. The order requiring him to pay has been suspended by the appeal, and he continues to make his objection which involves the "lawfulness" of the order. So that the statute furnishes no aid in determining the question of power in the court to make the order, for the disobedience of which it is sought under the statute to punish the attorney, but leaves the question to be determined upon reasons which are independent of the statute.

A motion to compel an attorney to pay over the money of his client is addressed to the equitable powers of the court (*Sexton v. Wyckoff*, 6 *Paige*, 182), and like other motions for cumulative relief, is made to the favor and conscience of the court (*Ackerman v. Ackerman*, 14 *Abb.* 229). And as equitable powers are discretionary powers, the court may or may not in its discretion, entertain the motion. But having

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entertained it, the appellate court will not interfere with such discretion, unless there has been a palpable abuse. That is undoubtedly so, to the extent of the initial proceeding. So that, if upon the plaintiff's affidavit the court was authorized to make the order to show cause this court would not disturb the order. Upon her papers it appeared to be the ordinary case of a withholding of her money by her attorney. But when the issue was raised by the attorney upon the disputed fact of the existence of a special agreement, and he objected to the court's further entertaining the motion, claiming his right to have that question tried by a jury, it no longer remained, as he claims, a matter of discretion to proceed or not to proceed with the motion. For, if the attorney had such right of a jury trial, as is secured by the constitution, the court was without power to deprive him of it.

This absolute right of trial by jury in equitable action, of such issues as may now, under the blending of law and equity, be included in one action, is fully recognized by the court in several cases (*Penn. Coal Co. v. Delaware &c. Canal Co.*, 3 *Abb. Ap.* 470; *Davis v. Morris*, 36 *N. Y.*, 563). But the right may be waived by not objecting (*Barlow v. Scott*, 24 *N. Y.*, 40; *West Point Iron. Co. v. Reymert*, 45 *Id.*, 703).

In *Hudson v. Caryl* (44 *N. Y.* 553), the action was to abate a nuisance and for damages, and it was objected that it was triable by a jury. The objection being overruled, it was tried by the court without a jury. On appeal the court recognized so much of the action as related to abating the nuisance as being of exclusive equitable cognizance, but as, under the code, a legal can be united with an equitable cause of action, the court held, that as the claim for damages could be united in the action, that issue should have been submitted to a jury.

In *Colman v. Dixon* (50 *N. Y.*, 572), the action was

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to restrain the use of a trade-mark and for damages, and defendant applied for issues to be tried by a jury. This was denied on the ground, that the denial of the motion did not deprive the party of his right to a jury trial, if he had such right. At the trial he could move for such a trial, and the refusal to grant the motion would be error, if the constitutional right existed.

The right, however, may be waived by failing to appear at the trial, or by omitting to object at the trial; but if the objection is taken, and the case is one in which a jury trial has been heretofore used, it must be so tried.

The constitutional provision is necessarily, I think, restricted to *actions*. The language is, the trial by jury "*in all cases*" in which it has been heretofore used; and I am not aware that at any time it was the practice of the courts to send disputed questions of fact arising upon a motion to a jury for trial. Such questions were always determined by the court, or, under the authority of the statute, sent to a referee to take and report the proofs (*Code*, § 271, *Sub. 3*). And even where the issue was such, that in an action the court could neither try or refer, it could do either when the question arose upon a motion.

As has already been said, motions are chiefly addressed to the equity side of the court; few are founded upon absolute right; and courts of equity have always when it saw fit, determined questions of fact without the aid of a jury. And its power to do so has not been disputed.

It can not, therefore, be said, that motions or any of the questions of fact arising upon motions, are "*cases*" in which the trial by jury was heretofore used; and, hence, they are not within the constitutional provision.

The power of the court was intended to be full, and very properly should be exercised in a summary man-

ner. The performance of the various professional duties of an officer of the court should be rigorously enforced, and by means adequate to the end to be accomplished. This is due not only to the rights and interests of clients, who have confided in the integrity and skill of their attorney, but it is also due to the dignity and well being of the profession, and to the respect for the orders and decisions of the bench, which the court has the right to insist upon and require.

It was in view of this duty, that the court has always proceeded in a summary manner against an attorney, who has neglected or refused to pay over his client's money.

But, as has already been said, the cases (and they are not many) do not show that there was any such dispute or issue raised between the attorney and client, as is raised in this case.

I have examined the cases cited by the respondent's counsel, and none of them involved a disputed question of fact arising upon the assertion of a special agreement. They either involved the character in which the attorney acted, or the value or rate of his compensation which could be ascertained by a mere taxation. They all assert the power of the court to deal summarily with its attorneys; but in none of them, was there an agreement alleged, which fixed and determined the measure of compensation. They were cases arising in the English courts, or in this State before the code, and could not, therefore, have involved a question under a contract, made valid by the code, which was invalid before. Thus in (*Merrit v. Lambert*, 10 *Paige*, 352), the special agreement set up by the solicitor was held to be void, and therefore, presented no issue upon it. And a like decision was made in *Matter of Bleakley* (5 *Paige*, 311).

As the law existed at the time those decisions were made, the court determined as matter of law, upon

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undisputed facts, that the alleged agreements could not be sanctioned by the court, as they tended to champerty and maintenance.

Those cases therefore do not reach the question before us, where, if the agreement is proven, it *must* be sanctioned by the court; and where the vital question is, Does such an agreement exist?

The ground upon which the court placed its decision in *Ackerman v. Ackerman (ubi sup.)*, was that the power which the court exercises in the matter of an attorney's lien is an equitable one, in which the aid of a jury is not necessary and can not be demanded as a matter of right. In that case, however, it did not appear that any special agreement respecting the attorney's compensation was alleged, or that the objection was taken to the matter being tried by the court. But upon the general power of the court to entertain the motion, the decision is explicit, as well as that there is no right of trial by jury.

In two English cases the court refused to try on a motion of this nature, a disputed question of fact. In *Hodson v. Terrall* (2 *Dowl. O. S.* 264), the motion was for the attorney to show cause why he should not pay over his client's money, and the *client* averred that he had a special agreement with the attorney fixing his compensation. This the attorney denied, and the court (BAYLEY B.) say: "I think we can not interfere. You must go before a jury who will be competent to decide whether there was such an agreement." In the other case (*Beal v. Langstaff*, 2 *Wils.* 371), the motion was to require an attorney to perform a parol promise to indemnify bail, and the court say: "This is only a breach of a parol promise, and we can not interfere in a summary way."

One or two cases in this State indicate opinions which are claimed to be favorable to the objection of the attorney in this case.

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The power of the court (which, however, is firmly upheld) it is claimed is qualified in *Bowling Green Sav. Bank v. Todd* (52 N. Y. 489), and must be deemed to be limited by the decision, to matters as to which there is no *dispute* as to the facts. The court say (p. 493) "the practice in this State has been uniform to allow an attachment when the attorney retains money in his hands that justly belongs to his client." But there the court determined, as a matter of law, upon undisputed facts, as in *Merritt v. Lambert* (*ubi sup.*), that the lien which the attorney claimed did not exist. And now the converse is claimed, that if the facts had been *in dispute*, the court would not have entertained the motion.

In *Haight v. Holcomb* (16 How. Pr., 173) the defendant moved to set aside an execution on the ground that the judgment was settled. The execution was issued by the attorney for his costs. In the course of the opinion the court say: "Should there be a dispute between the attorney and his client, as to what the agreement was, and to what amount it extended, I know of no short remedy to which an attorney is entitled, by which to avoid settling that dispute in the usual way, and by the usual tribunals."

And in *Fox v. Fox* (24 How. Pr. 409) the motion was to compel the plaintiff to pay his attorney and counsel, and a special promise was alleged (but which was denied), under which the services were rendered. And it was objected that the court could not, upon a motion, determine the question. The court say: "If there be no short way of accomplishing this, there remains the usual way by direct action for that purpose. Indeed this seems to me the true mode of proceeding, when there is a dispute as to what the contract is, or in regard to the amount which the attorney is entitled to demand under it, and also where the amount of compensation is by express agreement

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made to depend on the value of the services, and is unliquidated.”

None of these cases, however, assert an absolute right of trial by jury. Sitting as a court in the exercise of its equity powers, it had the right to refuse to entertain the motion, and to put the applicant to his action, when the disputed question could be determined by a jury. In the same manner, a court of equity may try any question of fact arising in an equity action; or it may upon motion and framed issues send it to a jury. And I do not understand any of the cases as deciding otherwise than that it rests in the sound discretion of the court, whether it will entertain a motion of this nature, where a question is at issue, which it is claimed by one or both of the parties, should be tried by a jury. And that is the extent of the meaning of the judges in the cases I have cited. In their judgment they were proper cases for a jury. And the judge who decided this case at special term, could have said the same, and sent the plaintiff to her action, and a jury. And such disposition of the matter would not have been disturbed.

But it does not follow, from any of the cases, and no such opinion is intimated, that there was any such right of a jury trial, as would deprive the court of its jurisdiction to entertain the motion.

The power which a court has over its officers is to prevent them from, or punish them for committing acts of dishonesty or impropriety, calculated to bring contempt upon the administration of justice (*In re Pascal*, 10 *Wall*, 483). In that case the court say, the ground of the jurisdiction thus exercised is the alleged *misconduct* of the officer. The question is not merely whether the attorney has received the money, but whether he has acted improperly and dishonestly, in not paying it over. “If no dishonesty appears, the party will be left to his action.” The motion, as in this case, was to compel the attorney to pay over the



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money, and the attorney set up his lien for compensation. In denying the motion, Justice BRADLEY placed the decision upon the ground that the attorney had the right to retain the money, if he had a fair and honest set-off; and that in retaining the money for the purpose of procuring a settlement of his claim, he had done nothing to call for the summary interposition of the court.

In that case, however, the power to entertain these motions is again fully recognized. But the court, in the exercise of its equity powers, admitting the justice of the attorney's claim, refused to try the question of his lien, on the motion, and put the party to his action. Not, however, as a matter of right, but as being a proper mode of determining the dispute in that case.

The whole question resolves itself into this: First, can the court exercise summary authority over its attorneys, to compel them to pay over the money of their clients? And, Second, can it, upon the motion, try any disputed question of fact, arising between an attorney and his client?

The first is determined by the large and uniform practice of the courts. And the second, by the consideration of the single question, whether it is a *case* in which the trial by jury was heretofore used?

The answers to these questions are adverse to the objection in this case.

The motion was addressed to the judicial discretion of the court below. We can not say, if we were now entertaining the motion and not reviewing the order, that we should not have felt constrained to have sent the plaintiff to her action, that the facts might go before a jury. But a mere difference of views on that subject is not ground for reversal of the order made.

There has been no abuse of discretionary power.

Although the statute, under which this proceeding is had, is designed to *punish* attorneys for any mis-

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behavior in office, or willful neglect or violation of duty, or disobedience of the process or lawful order of the court,—and the punishment may be a fine or imprisonment or both, as the nature of the case may require ;—and although the severity with which the courts may deal with its officers, to punish them for the offenses enumerated in the statute, which is not restricted to a fine and imprisonment only, but may also be by removal from office (*Matter of Bleakly*, 5 *Paige*. 311), requires that all the constitutional rights of an attorney should be carefully guarded and protected ;—and although such protection in due to him, not only nor so much, that his personal liberty may be imperiled, as that the charge involves his personal integrity and honor, and is calculated to deprive him of his clients, of the respect of his associates, and of the confidence of the court ; yet the mode adopted upon this motion was not calculated to jeopard any of such legal rights, but was probably a more satisfactory manner of settling his differences with his client, than it would have been to have sent the case before a jury, whilst it also afforded him every reasonable protection against the penalties which the statute was intended to inflict.

If in answer to the claim of the client a defense was interposed which if sustained would justify the attorney in withholding his client's money, the court, until his claim upon it has been properly investigated and determined, would not invoke the power of the statute. And if, upon such investigation, the claim was found to be just, the court will protect the attorney and exempt him from the penalties of the statute.

The question is new, necessarily new, from the novel provision of the code which allows of an agreement to fix the measure of an attorney's compensation, and which may be at an agreed sum, or contingent upon success.

In the cases where the courts have proceeded sum-

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marily, the defense to the motion has been held insufficient in law, and the fact presented in this case has not arisen. There being no question in dispute, no constitutional right or otherwise of the attorney was violated in entertaining and determining the motion at special term.

But in this case, the constitutional right to have the fact which is alleged in answer to the plaintiff's application determined by a jury, is sufficiently and properly raised.

But, for the reasons stated, it is not well taken.

There is no allegation or charge anywhere in the papers, which impugns the integrity, professional conduct, or skill of the plaintiff's attorney and counsel. His claim to compensation is one recognized by law, and he was justified in withholding the money collected on the judgment, until his claim to compensation was allowed by his client, or disallowed by the courts. And the only question that has entered into the controversy, has been, as to the mode of trying the question.

The order appealed from must be affirmed, with costs.

FREEDMAN, J., concurred.

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Statement of the Case.

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GEORGE M. CHAPMAN, PLAINTIFF AND RESPONDENT, v. JAMES O'BRIEN, SHERIFF, ALEXANDER DOUGLAS, JACOB SEEBACHER, JOHN GRAHAM, AND CHARLES A. JENKINS, DEFENDANTS AND APPELLANTS.

**I. EXECUTION AGAINST PROPERTY.**

**1. BOND OF INDEMNITY—SPECIAL CONDITION—WHAT SUFFICIENT PROOF TO MAKE A PRIMA FACIE CASE AGAINST SURETIES UNDER.**

**1. *Special clause.***

a. The bond recited the recovery of a certain judgment, and the issue of an execution thereon to the sheriff against the property of the judgment debtor, and then further recited, "Whereas CERTAIN *personal property* that appears to belong to the said judgment debtor against whom said execution has been issued, as aforesaid, is claimed by some other party or parties," and was CONDITIONED to save the sheriff, and all persons aiding him from all harm, &c., that might arise, &c., against him or them, "as well for the levying, attaching, and making sale under and by a virtue of such execution of ALL OR ANY *personal property which he or they shall or may judge* to belong to said judgment debtor, as in entering any shop, store, building, or other premises for the taking of an such personal property."

**2. *Evidence, what establishes a prima facie case against the sureties under such a clause.***

a. Where the *answer of the sureties*, after a general denial, in a separate affirmative defense *claims* that the property for the taking of which the action is brought was the same property which was levied on under an execution issued in a certain described action, the description of which is the same as the description contained in the bond of the action therein referred to, and further claims that such property belonged to the judgment debtor in the judgment described in the answer; and the efforts of all the *defendants* (being the sureties, the sheriff, and the deputy, who made the levy) are directed at the trial to elicit and establish the facts that the property in question was the

## Statement of the Case.

in the possession of, and used by the judgment debtor; that it apparently belonged to him; that he had really a leviable interest therein, and that it was rightfully levied on;

*a prima facie case is presented,*

that the sheriff had not only levied on the property claimed by the plaintiff, *but that he had judged that it belonged to the judgment debtor, and,*

1. A motion by the sureties to *dismiss the complaint was properly denied.*

a. If at the conclusion of the whole testimony, a doubt remained whether the levy was within the authority conferred by the bond, *the jury should be directed to determine the fact.*

## II. NEWLY DISCOVERED EVIDENCE.

1. MOTION FOR NEW TRIAL ON GROUND OF DENIED, ALTHOUGH THE MOVING PAPERS SHOW A PRIMA CASE.

a. When the case made by them is to a great extent neutralized by opposing affidavits, and the credibility of the affiants for the moving party is materially impaired by retractions, explanations, and qualifications, made by some of them in subsequent affidavits, in which they also stated the manner in, and inducements under, which these prior affidavits had been procured, and other suspicious circumstances appeared, such as that several of the affiants could not be found at the places of residence given by them; that one denied that he had signed or sworn to any affidavit; that another had admitted that the affidavit made by him was untrue, and had been made for a money consideration; that the moving party had paid out considerable money, and had agreed with one of the affiants to pay him a large sum for the discovery and procuration of testimony sufficient to obtain a new trial, *the motion should be denied.*

Before MONELL, Ch. J., and FREEDMAN, J.

*Decided April 5th, 1875.*

The plaintiff complained as follows: "That heretofore and at the several times hereinafter mentioned, he was in possession of the premises, in the city of New York, being the third and fourth lofts of factory, on the north side of West Thirty-third street, between

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Tenth and Eleventh avenues ; that on or about the 5th day of February, 1868, the defendants broke and entered into and upon the said premises, and committed divers injuries to said premises and the personal property therein, and took and converted to their own use divers articles, consisting of machinery, furniture, and fixtures, then and there being the property of the plaintiff, of the value of about thirty thousand dollars ; all of which is to the damage of the plaintiff the sum of thirty thousand dollars ; for which said sum, with interest thereon from the 5th day of February, 1868, the plaintiff demands judgment."

The defendants' answers contained, in effect, a general denial and a justification of the taking of the property by the defendant, James O'Brien, as sheriff, and the defendant, Jacob Seebacher, as deputy-sheriff, under executions against the property of one William R. Ellis, a judgment debtor, in favor of the defendant, Alexander Douglas.

The defendants O'Brien and Seebacher further alleged :

(1) That under and by virtue of said executions they, as sheriff and deputy-sheriff respectively, forthwith, upon the receipt of the same made a formal levy upon certain furniture, machinery, and fixtures of the character and description of those mentioned and described in the complaint, and took the same into their custody, which they believe to be the same personal property referred to in the complaint.

(2) That the said levying upon and taking possession of said personal property, was merely formal, and said property was not removed, nor in any way disturbed, and that after having nominal possession of the same for two days only, they having made a levy upon other property of said William R. Ellis, of sufficient amount to satisfy the executions and precept aforesaid, before the commencement of this action returned said

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Appellants' points.

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furniture, machinery and fixtures to the possession of the parties from whom the same were taken, in like good order and condition, in every respect, in which the same were received ; and that the said levy, and taking, and detention, as aforesaid, constitute the supposed wrongful taking and conversion in the complaint alleged.

At the trial the plaintiff had a verdict for seven thousand one hundred dollars.

Defendants' counsel moved for a new trial upon the judge's minutes, which motion was denied, and an order was entered to that effect.

Subsequently the defendants moved, on a case and exceptions and on affidavits, at a special term of the court, for a new trial on the ground of newly discovered evidence. This motion was also denied.

The defendants appealed from the judgment, and the two orders denying the motions for a new trial.

*Brown, Hall, and Vanderpoel*, attorneys, for appellants O'Brien and Seebacher.

*R. C. Elliot*, attorney, and of counsel for appellants Douglas, Graham, and Jenkins, urged:—I. The simple giving of a bond of indemnity to the sheriff, it is submitted, is not enough to justify a recovery against the judgment creditor in the execution and the sureties, unsupported by any evidence showing the giving of the bond for the purpose of seizing the property in question, or any direction to the sheriff to levy upon the property. Not a particle of evidence had been given connecting these defendants with the alleged levy at the time said motion was made, neither was any presented afterwards. The sheriff having been directed to levy upon the property of Ellis in the second floor, the sewing machines, &c., which this plaintiff claimed, and the bond having been called for and

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Respondent's points.

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given to indemnify the sheriff in seizing that property ; he is neither indemnified nor authorized, nor directed by anything in the bond to seize property on the third floor—property that never appeared to belong to the judgment debtor Ellis—property that the judgment creditor and his sureties knew nothing about. And the sureties are not liable for his act in so doing. If they are liable for this act of the sheriff, by reason of a wrongful levy upon the next floor, so would they be for a levy in the next building or the next block. The authorities in relation to this question are not numerous (*Davis v. Newkirk*, 5 *Den.* 92; *Averill v. Williams*, 1 *Den.* 501; Same Case, 4 *Den.* 295; *Allen v. Crary*, 10 *Wend.* 349; *Stewart v. Wells*, 6 *Barb.* 79; *Fonda v. Van Horne*, 15 *Wend.* 631; *Herrick v. Hoppock*, 15 *N. Y.* 413; *Ball v. Loomis*, 29 *N. Y.* 412; *Ford v. Williams*, 13 *N. Y.* 579; *Chapman v. Douglas*, 15 *Abb. Pr. N. S.* 421; *Griffiths v. Hardenburgh*, 41 *N. Y.* 464). In all the cases either the bond of indemnity was given to seize particular property as in *Davis v. Newkirk*, or the plaintiffs below directed the levy, as in *Allen v. Crary*, and the parties are responsible only so far as they may have directed or assented to the doing of the act complained of (*Chapman v. Douglas*, 15 *Abb. P. N. S.* 428).

*Erastus New*, attorney, and of counsel for respondent, urged :—I. It is too late for defendants to object that the evidence was insufficient to sustain the verdict, no such objection having been made at the trial. They took the chance of a verdict in their favor, and now they ought to be bound by the result (*Rowe v. Stevens*, 34 *N. Y. Sup'r Ct.* 437; 45 *N. Y.* 632).

II. The defendants, *Douglas*, *Graham* and *Jenkins*, were liable for the acts of the sheriff, by reason of their having executed and delivered to him on January 29th, 1863, the undertaking in question. This authorized and



## Respondent's points.

directed the sheriff to levy on any property he might "judge" belonged to Ellis. O'Brien and Seebacher, in their answers, allege that the property levied on belonged to Ellis, and the defendants who signed the undertaking, in their answer also allege that the property levied on under the executions, "being the same property mentioned and referred to in the complaint," belonged to said Ellis. It is clear from this that the sheriff was acting within the provisions of said undertaking, and that the property levied on, was by him "judged" to belong to Ellis. The parties to the undertaking being liable to the sheriff for his acts in making said levy, are also liable to the plaintiff for the acts of the sheriff (*Herring v. Hoppock*, 15 *N. Y.*, 409; *Ball v. Loomis*, 29 *N. Y.*, 413; *Davis v. Newkirk*, 5 *Denio*, 92). In *Davis v. Newkirk*, BEARDSLEY, Ch. J., says: "All who direct, request or advise an act to be done which is wrongful, are themselves wrongdoers, and responsible for all damages." In *Chapman v. Douglas*, (15 *Abb. Pr. N. S.*, 421), the sheriff levied upon a safe, and carried away also a quantity of silk, in said safe at the time, the plaintiff refusing to unlock said safe and remove said silk. The sureties were held liable for the act of the sheriff in taking the safe, but not for his act in taking the silk, because the sheriff did not pretend to levy on said silk, nor did he judge that it belonged to the judgment debtor. In the present case, the sheriff did levy on the property of plaintiff, and did judge that it belonged to Ellis.

III. The pretended newly discovered evidence is cumulative within the rule, as laid down in *Brisbane v. Adams*, 1 *Sandf.*, 195; *Leavy v. Roberts*, 8 *Abb. Pr.*, 310; *Tripler v. Ehehalt*, 5 *Rob.*, 609; *Sheldon v. Stryker*, 27 *How.*, 387; *Ritter v. Phillips*, 84 *N. Y. Sup'r Ct.*, 290; *Peck v. Hiller*, 30 *Barb.*, 659; 45 *Id.*, 201.

IV. The affidavits of the defendants are so fully

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contradicted, corrected, and explained by the counter affidavits of the plaintiff as to be unreliable, and insufficient to warrant a new trial. The evidence is not such as would be likely to influence a verdict (*Darbee v. Elwood* 2 *How.*, 599).

BY THE COURT.—FREEDMAN, J.—The exceptions taken during the trial, relate to the admissibility of the indemnity bond given by the defendants, Douglas, Graham, and Jenkins, to the sheriff, and to their liability thereon, for the sheriff's acts. The bond contained an obligation in the sum of one thousand dollars, and it recited the recovery by Douglas, of a judgment against William R. Ellis; that an execution had been issued thereon, and had been directed and delivered to the sheriff; and that certain personal property which appeared to belong to the said judgment debtor, was claimed by some other party or parties. The condition of the obligation was then stated to be such, "that if the above bounden obligors shall well and truly save, keep and bear harmless, and indemnify the said James O'Brien, and all and every person and persons aiding and assisting him in the premises, of and from all harm, let, trouble, damage, liability, costs, counsel fees, expenses, suits, actions, judgments, special proceedings, and executions, that shall or may at any time arise, come, accrue or happen to be brought against him, them, or any of them, as well for the levying, attaching and making sale under and by virtue of such execution of all or any personal property which he or they shall or may judge to belong to the said judgment debtor, as in entering any shop, store, building, or other premises, for the taking of any such personal property, then this obligation to be void, else to remain in full force and virtue."

This bond authorized the sheriff, and all persons acting under him to levy on any property which he or they

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might judge belonged to Ellis. It was therefore clearly admissible against the parties who had executed it.

As to their liability thereon, it appeared from their answer, that they claimed that the property levied on under the execution, was the same property which was mentioned, and referred to, in the complaint, and that the same belonged to Ellis. The answers of O'Brien and Seebacher also contained an allegation that the property levied on belonged to Ellis. At the trial, the efforts of all the defendants were directed to elicit and to establish the fact that the property in question was in the possession of and used by Ellis; that it apparently belonged to him; that he had really a leviable interest therein; and that it was rightfully levied upon. A *prima facie* case was thus presented, that the sheriff had not only levied on the property claimed by the plaintiff, but that he had judged that it belonged to Ellis. Under these circumstances, the refusal to dismiss the complaint as against the defendants, Douglas, Graham, and Jenkins, was not error. If at the conclusion of the whole case there remained a doubt as to whether, in making the levy, the sheriff did not exceed the discretion or authority conferred upon him by the bond as to the particular property levied upon, or any part thereof, the court should have been requested to submit such question to the jury as a question of fact. But no such request was made.

The defendants also failed to move for the direction of a verdict, and to except to the charge. Under these circumstances, and there being sufficient evidence to sustain the verdict, the motion for a new trial on the minutes was properly denied. On looking over the testimony, no sufficient reason can be discovered why such ruling should be disturbed. All the questions of fact involved in the case, the ownership of the property, the levy of the sheriff, and the extent of his interference with the property, the release of the levy, the return of

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the possession of the property, and plaintiff's acceptance, and the amount of damages sustained by the plaintiff, were fully and fairly submitted to the jury upon testimony more or less conflicting, and under a charge with which all the defendants were so well satisfied that none of them excepted to it, or any part thereof. The defendants are not entitled, therefore, to have the verdict set aside as being against the weight of the evidence given upon the trial.

The defendants further insist that notwithstanding these matters their motion for a new trial on a case should have prevailed, and that a new trial should have been granted as a favor on the ground of newly discovered evidence. This evidence is by far too voluminous to be satisfactorily adverted to in detail. It is claimed that it establishes that the plaintiff exercised care and control of and over the looms and property in the third and fourth floor of the factory; that he claimed to be the owner of, and endeavored to sell, the same a long time after his alleged abandonment of the property to the sheriff. If its general effect were to be taken as claimed, the evidence would have been material on the trial, for it would have greatly strengthened the theory of the defense that, though originally there may have been a technical abandonment of the property to the sheriff, the levy was in turn abandoned by the sheriff, and that the plaintiff, after notice of such fact, resumed possession and control. In this aspect the evidence is perhaps not cumulative within the rule, and as it can not be said that the defendants were bound to anticipate plaintiff's denial of the receipt of notice of the abandonment of the levy, and that they should have been prepared with proof to strengthen their case on that point, a new trial should have been granted on terms, if, upon the case as made on both sides, the general effect of the alleged newly discovered evidence had been left as the defendants

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Opinion of the Court, by FREEDMAN, J.

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intended it should appear, and the evidence had remained free from suspicion. But its effect was to a great extent neutralized by opposing affidavits, from which it plainly appeared that the alleged control of and interference with the property related not to the property levied upon, but to certain looms owned by Ellis, which, after Ellis's death, the plaintiff had taken charge of as administrator. The credibility of the remainder of the evidence was materially impaired by the retractions, explanations, and qualifications, which some of the affiants subsequently made in favor of the plaintiff, and by the account which they gave of the manner in, and the inducements under, which their affidavits had been procured. Besides this there were other highly suspicious circumstances. It was positively shown that several of the so-called newly discovered witnesses could not be found at the places of residence given by them in their several affidavits; another denied that he had signed or sworn to the affidavit which purported to have been made by him; and of still another it was proven, without contradiction, that he had admitted that the affidavit made by him for the defendants was untrue, and had been made for a money consideration. It was also made to appear that the defendants had not only paid out considerable sums, but that they had agreed with one of these witnesses to pay him as much as six hundred dollars for the discovery and procurement of testimony sufficient to obtain a new trial.

Under these circumstances the affidavits produced on both sides did not present a case for a new trial within the established practice of the courts, and the motion was properly denied.

The judgment and the two orders appealed from should be severally affirmed, with costs.

MONELL, Ch. J., concurred.



CASES ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK.

AT GENERAL TERM.

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J. WATTS DE PEYSTER, PLAINTIFF, *v.* JOHN  
MURPHY, DEFENDANT.

CITY ASSESSMENTS FOR STREET IMPROVEMENTS.

*When deemed to be confirmed and to become a lien upon the property included therein?*

No such assessment shall be deemed to be fully confirmed, so as to be due, and be a lien upon the property included in it, until the title thereof, with the date of confirmation, shall have been entered, with the date of such entry, in a record of the titles of assessments, kept in the office of the street commissioner, and *also* until the title of said assessment shall have been entered with the date of confirmation, and of said entry, in a record of the titles of assessments confirmed, kept in the office of the clerk of arrears (*Laws of 1853, 1865, § 6; Laws of 1871, 741, § 1*).

Assessments for street improvements in the city of New York, are not only a personal liability against the owner of the lands included therein, but are also a lien, or charge upon such lands (*2 Rev. Laws of 1813, 407, § 175*).

By subsequent statutes this lien becomes fixed as an incumbrance, in the nature of a mortgage upon said lands, from the time of its entry or record in certain designated offices.

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Statement of the Case.

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The officers clothed with authority to collect these assessments in New York city, are not required to demand, and seek to collect the assessment of the owners of such lands, although such owner is primarily bound and legally liable to pay the same.

Resort may be had primarily to either the land or to the owner thereof; but when the land is resorted to, and the lien or incumbrance created, *in the first instance*, such action necessarily extinguishes the personal liability of the owner of said land.

In the case at bar, the premises were sold and conveyed on December 5, 1870, by plaintiff to defendant, the plaintiff covenanting that the premises were at the time of the conveyance free, clear, and discharged and unincumbered of all taxes, assessments, and incumbrances. The assessment in question was duly entered, and became a lien upon the premises, December 24, 1870. After the assessment was so entered, the plaintiff paid the same, subject to the agreement of the defendant that he would return the money if the plaintiff was not legally liable to pay the same, and this suit was brought to recover the money so paid.

Held, by the court, That plaintiff was not liable to pay this assessment. The cases of *Downey v. Mayor, &c.*, 51 *N. Y.* 186; *Rundell v. Lakey*, 40 *Id.* 513; *Cranston v. Mason* (Hon. Charles P. Kirkland, referee, case not reported), and also the several statutes relating to the subject-matter, reviewed by the court.

Before MONELL, Ch. J., and CURTIS and SPEIR, JJ.

*Decided May 3, 1875.*

Verdict taken subject to the opinion of the general term.

The action was to recover the amount of an assessment for a street pavement.

The plaintiff, the owner of a lot of land on Thirty-seventh-street, in this city, made an agreement with the defendant, on November 3, 1870, to sell and convey it to him.



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Statement of the Case.

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The contract provided that the deed should be delivered on December 5, and that it should be a proper deed for conveying the fee simple, "free from all incumbrance," and should contain a general warrantee, and the usual full covenants.

The deed was delivered on the day specified in the contract. It contained a covenant on the part of the plaintiff (grantor) that the premises "now are free, clear, discharged, and unincumbered of all taxes, assessments, and incumbrances."

Subsequently there was found to be an assessment upon the lot, and the parties made the following agreement :

"In the matter of the purchase by John Murphy from J. Watts de Peyster, of the two lots southwest corner Broadway and thirty-seventh-street: It is hereby agreed that General de Peyster shall pay the assessment of \$830  $\frac{26}{100}$  for Nicholson Pavement on Thirty-seventh-street, returned against this property; that such payment shall not affect the question of his liability to pay the same; that such liability may be legally determined; and that if it shall be established that General de Peyster is not liable, Mr. Murphy shall return to him the amount with interest."

It was shown on the trial, that from April 1, 1870, to December 5, 1870, the plaintiff was out of the city of New York. That during the interval he did not see the premises, that they were in charge of a Mr. Woods, that the sale to the defendant was effected through brokers, and consummated by Woods.

The assessment list for paving Thirty-seventh-street, contained the ordinance of the common council, and the time of its adoption.

The work was finished prior to May 3, 1870. The assessment apportioning the expenses upon the property benefited, was made by the assessors prior to August 15, 1870 (that being the date of their certificate),

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Plaintiff's points.

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it was entered in the office of the board of assessors, on November 21, 1870, and confirmed by the board of revision and correction of assessments, on November 7, 1870.

The title of the assessment was entered in the *Title Book of Assessments*, in the Bureau of Arrears, on December 24, 1870. The entry in the book of the record of the title of assessments (kept in the street commissioner's office and in the office of the clerk of arrears) shows the same date.

The court directed a verdict for the plaintiff, subject to the opinion of the court at general term.

*Charles E. Crowell*, for plaintiff, argued:—I. That the assessment in question, for the amount of which this action was brought, was not fully confirmed, and a lien upon the premises, until the entry of the assessment was made in the Title Book of Assessments in the Bureau of Arrears, to wit, December 24, 1870 (*Laws of 1853*, p. 579, ch. 1065). Section 6 is as follows: "No assessment for any improvement shall hereafter be deemed to be fully confirmed, so as to be due, and be a lien upon the property included in it, until the title thereof, with the date of confirmation, shall have been entered, with the date of such entry, in a record of the titles of assessments, to be kept in the street commissioner's office, and which may be used as an index to a record of assessments; and until the title of the said assessment shall have been also entered, with the date of confirmation, and the date of such entry, in a record of the titles of assessments confirmed, to be kept in the office of the clerk of arrears" (See also *Hoff. Laws City N. Y.* 600, 602). (a) The intention of the legislature that an assessment shall not become a lien in real estate until entered in the bureau of arrears, is again shown in *Laws of 1871*, p. 741, ch. 381. Second half of section 1 reads as follows: "No

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Plaintiff's points.

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assessment for any city improvement shall be deemed to be fully confirmed, so as to be due, and be a lien upon the property included in the assessment, until the title thereof, with the date of confirmation by the supreme court, or by the board of revision and correction of assessments, as the case may be, shall be entered, with the date of such entry, in a record of the titles of assessment confirmed, to be kept in the office of the bureau of the clerk of arrears" (see *Dowdney v. Mayor*, 54 *N. Y.* 186).

II. Taxes and assessments are not liens upon real estate until made so by act of legislature. 2 *Dillon on Muni. Corp.* 573, says: "It is undoubtedly a sound proposition, that taxes, whether general or special, are not liens upon the property against which they are assessed; unless made so by the charter, or unless the corporation is authorized by the legislature to declare them to be liens" (38 *Pa. St.* 339-471; 41 *Id.* 60; 6 *Md.* 71; 3 *Gill*, 445; 1 *Hoff. Laws of N. Y.*, 554, 602). "The clerk of arrears shall keep a record of the title of assessments confirmed, with the date of confirmation and date of entry, as the same may be returned to him by the street commissioners" (*Rev. Corp. Ord. of N. Y.* 1859, § 78).

III. This is a strict question of law and not of equity. The cases cited by defendant are all based upon principles of equity, and are not in point, or can not be taken as authority here. In *Kern v. Towsley* (45 *Barb.* 150), case cited by defendant, JOHNSON, J., says: "Looking at all the provisions of the contract, there can be no doubt that the parties contemplated and intended the tax for that year, which was in progress of being made and completed." In case of *Rundell v. Lakey* (40 *N. Y.* 513), case cited by defendant, LOTT, J., was for reversal, on the ground that the tax was no lien until levied by the supervisors, which was after the conveyance. WOODRUFF, J., did not vote.

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Plaintiff's points.

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(Decision in 8 *Paige*, 337). Decision was based entirely on equitable grounds ; mistake of fact, and misled by terms of sale, in that the assessment had been paid, and parties bid for property accordingly. It would be absurd to hold that an assessment becomes a lien or incumbrance as soon as the last stroke of work was done. What security is there in searching titles, if there is no decided law on the subject ?

IV. The case of *Dowdney v. Mayor, &c.*, is similar, and authority in this action (54 *N. Y.* 186). It is claimed by the respondents, and, I think, correctly, that the assessment in question was not a lien or incumbrance within the meaning of the covenant against charges, taxes, assessments, and incumbrances in the deed executed by them to the grantors of the plaintiff on June 15, 1866, because it had not then been confirmed. No tax or assessment can exist until the amount thereof is ascertained or determined (*Kern v. Towsley*, 45 *Barb.* 150 ; *Post v. Leet*, 8 *Paige*, 337). And the *Law of 1853* (ch. 579, § 6) requires that in the city of New York, assessments shall be entered as therein provided, before they become liens. This was not done, &c. All concur with LOTT, Ch. C.

V. (a) The contract should have provided for the assessment ; it provided for everything else. (b) The defendant does not show that he took into consideration the pavement in question when he purchased the premises, or that plaintiff obtained an enhanced price for the same. (c) The assessment is imposed upon the land and not the person ; and, when legally imposed, the plaintiff did not own the premises. (d) Statute should be construed as of paramount authority. (e) Why did not the defendant speak about pavement when the contract was entered into ? (f) An assessment can no sooner become a lien or incumbrance until the act of the legislature is complied with, than a judgment can be made a lien before it is docketed.

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Defendant's points.

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*John E. Parsons*, for defendant, argued:—I. The pavement was completed on May 3, 1870. The contract was not made until the following November. The plaintiff thus got the benefit of the paving in the enhanced value of his property. Parties to a contract are presumed to bargain with reference to the situation of the premises. The defendant determined what price he would give for the premises, in view of the fact that Thirty-seventh Street was paved with Nicholson Pavement. It was in view of the same fact that the plaintiff must be presumed to have fixed the price at which he was willing to sell. There is therefore the strongest equitable claim that the charge shall fall upon him.

II. The assessment was complete in all respects on November 7, 1870, when it was finally confirmed by the Board of Revision and Correction. The amount chargeable upon the premises was determined, and all that remained to make it a lien in the technical sense, so as to permit a sale for non-payment, was the mere manual act of having the title transmitted to the Bureau of Arrears for entry in the title-book kept in that office. It is true, that, by the Act of 1853, to make the assessment a perfected lien, required the title to be entered in the title-book in the office of the Bureau of Arrears; but this is solely with reference to proceedings to be taken by the city for the sale of premises for non-payment of assessments. No sale can be enforced until every statutory requirement is complied with; but when the question arises between vendor and vendee, the point is, what did the parties intend by their contract? The plaintiff agreed to sell the premises in their then situation, with the addition of the benefit received from the paving; and he agreed that the premises should be free from all charge, assessment, and incumbrance. These are broader terms than "lien." "Lien" might mean, the lien to be made perfect by complete compliance with all the statutory require-

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Defendant's points.

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ments. But the assessment would incumber the premises (even though it might be inchoate) if, at the time fixed for the delivery of the deed, there was a positive present liability, and every step had been taken by which it was determined exactly what was the amount of the charge.

III. *Rundell v. Lakey* (40 *N. Y.* 513) is much stronger for the defendant than this case. There, a vendor was held liable for the annual tax where the assessment had been laid, though the Board of Supervisors had not yet levied the tax. Until the action of the Board of Supervisors the tax was incomplete; the property could not be sold for the non-payment of the tax; and yet the Court of Appeals held the charge to constitute an incumbrance. The amount in question was assessed by the assessors against the plaintiff. He was liable personally for the payment (*Act of April 9, 1813, § 175; Rundell v. Lakey, supra*). And had the assessment been paid by any other person (*a fortiori* by the defendant), that person could maintain an action for reimbursement against the plaintiff, who would thus be made to pay (*Act of April 9, 1813, § 175*). That demonstrates his liability. If by circuitry the plaintiff could be made liable, he is liable when the direct claim arises. This whole question has been very thoroughly considered by Mr. Charles P. Kirkland, as referee in the case of *Cranston v. Mason*, and to his printed opinion general reference is made (*Post v. Leet, 8 Paige, 337; Prescott v. Trueman, 4 Mass. 627; Kern v. Towsley, 46 Barb. 150*).

IV. *Dowdney v. The Mayor* (54 *N. Y.* 186) is claimed to be in favor of the plaintiff. There the conveyance was on June 15, 1866; the assessment was not confirmed until October, 1866. At the time of the conveyance the amount of the possible assessment was neither ascertained nor determined, and it was upon that principle that the opinion, so far as concerns the

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Opinion of the Court, by MONELL, Ch. J.

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point in question, was put, LOTT, Ch. C., who had dissented in *Rundell v. Lakey*, delivering the opinion, and EARL, C., dissenting. An examination of the case will show that it turned upon other points, so that what was said by Judge LOTT was really *obiter*. Where, however, the commission is in conflict with the Court of Appeals, it is the court which controls.

BY THE COURT.—MONELL, Ch. J.—Unless the decision of this case is to be controlled by other considerations than a strict application of the provisions of the act of 1853 (*Laws* 1853, p. 1065), it must be determined that the assessment in question did not become an “incumbrance” upon the property until after the delivery of the deed. The sixth section of the Act referred to is as follows :

*“No assessment for any improvement shall hereafter be deemed to be fully confirmed, so as to be due, and be a lien upon the property included in it, until the title thereof, with the date of confirmation, shall have been entered, with the date of such entry, in a record of the titles of assessments, to be kept in the Street Commissioner’s office, and which may be used as an index to a record of assessments ; and until the title of the said assessments shall have been also entered, with the date of confirmation, and the date of such entry, in a record of the titles of assessments, confirmed, to be kept in the office of the Clerk of Ar-rears.”*

The deed was delivered on the 5th of December, and the entry required by the section quoted, was not made until the 24th of the same month, from and after which time only, it became a lien.

A later statute (*Laws* 1871, p. 741, § 1) also provides that—“No assessment for any city improvement shall be deemed to be fully confirmed, so as to be due, and be a lien upon the property included in the assessment,

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until the title thereof, with the date of the confirmation by the Supreme Court, or by the Board of Revision and Correction of Assessments, as the case may be, shall be entered, with the date of such entry, in a record of the titles of assessments confirmed, to be kept in the office of the Bureau of the Clerk of Arrears."

These statutes definitely fix the time when an assessment shall become a lien, and must govern in the construction and enforcement of covenants against incumbrances, unless upon some principle of equity, a different rule should prevail.

The covenant in the plaintiff's deed was, that at *the time of its delivery*, the premises should be free from incumbrances (and an "*incumbrance*" is defined to be a *lien* upon an estate.—Bouvier).

Under the statutes referred to, the assessment was not an incumbrance at the delivery of the deed, and there was, therefore, no breach of the plaintiff's covenant.

The language of the acts is explicit, and it was decided in *Dowdney v. The Mayor, &c. of N. Y.* (4 N. Y. 186) that the required entry must be made before the assessment could become a lien; and if not made prior to the delivery of the deed, there could not be a breach of the covenant against incumbrances.

The power to assess for benefit, was re-enacted by the Revised Laws of 1813 (2 R. L. 39) which declares that the amount of the assessments shall be a "real incumbrance" upon the lands assessed; and the only purpose of the subsequent acts, was, not to create, but to fix the time when the "incumbrance" should take effect upon the lands. That is now definitely determined by the entry in the record of assessments in the office of the Street Commissioner and Bureau of Clerk of Arrears.

The assessment, therefore, not having become a lien when the covenant was made, there was no right of action upon the covenant; nor did it afford any right



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to the purchaser to refuse to take the title under the terms of his contract with the plaintiff. Those terms were to convey free from incumbrances, and that the property was free from any legal incumbrance when the conveyance was made.

It is very clear, therefore, that had the defendant paid the assessment, he would have been without remedy under the contract or the deed. No covenant had been broken, as no lien had been created until after the covenant was made.

The defendant, however, claims, that notwithstanding the assessment had not become a legal lien when the covenant was made, the plaintiff is, nevertheless, liable to pay it, on the ground that the assessment had in fact previously been made; that the improvement had been completed, and the benefit derived before the sale.

The work was finished prior to May, 1870. The assessment was apportioned in August. It was confirmed November 7, and entered in the office of the Board of Assessors, November 21, 1870.

This claim of the defendant, however, is not made under or upon the covenant in the deed, but under the subsequent and separate agreement between the parties, which is to the effect that the payment of the assessment by the plaintiff should not affect the question of his "*liability*" to pay it.

In support of this claim we are referred to the case of *Rundell v. Lakey* (40 N. Y. 513).

In that case the defendants conveyed the land on September 1. The taxes for that year had been assessed to the defendants. The assessment roll had been completed on the first of the previous August, but the annual meeting of the Supervisors was not held until the succeeding November, when, and not until when, the tax was extended upon the roll.

The court held that the defendants were liable for

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the tax, upon the ground that the tax is imposed upon the *person* of the owner on account of the ownership, and that his *liability* is conclusively fixed by the completion and delivery of the roll.

The deed, conveying the property in that case, contained only a covenant of quiet and peaceable enjoyment, and of warranty, which is not broken except by actual ouster. It contained no covenant against incumbrances.

But the plaintiff paid the tax under an agreement with the grantors that "in case they (the grantors) were legally liable to pay it," they would refund the amount.

The only question, therefore, in that case, was as to the legal liability of the grantors to pay the tax. There was no question of lien or breach of covenant, to support the action, or to supply a consideration for the subsequent agreement. Had that agreement not been made, the purchasers would have had no remedy against their grantors, had they paid the tax, except, perhaps, after an actual ouster under a tax sale.

The decision in *Rundell v. Lakey*, rested solely upon the construction of the Revised Statutes concerning assessments and the collection of taxes (1 *R. S.* 387). By those statutes a tax is made exclusively a *personal liability*. No lien is created upon the lands. The tax is imposed upon the owner and not upon the land. It is collected of the owner out of his personal estate. He is the primary debtor, and the warrant to the collector, which the statute authorizes, is the judgment and execution for the debt, and must be made out of the goods and chattels of the debtor. Nor is it confined to chattels on the lands, but may be collected out of the goods and chattels of the person taxed, "wheresoever the same may be found" within the district of the collector.

The land assessed is only *secondarily* liable. In

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default of sufficient goods and chattels of the person assessed, provision is made for the sale of the lands, in respect to the ownership of which the tax was imposed. And so far, and so far only, a tax may be regarded, perhaps, as a lien, or in the nature of a lien, upon the lands. But whatever it is, it is subordinated to the personal liability of the owner, and can be enforced only in default of collecting out of the owner's goods.

The decision, therefore, in the Rundell case being upon a construction of the revised statutes and of the agreement of the parties, has not, in my judgment, any application to the question now before us, which depends upon a different state of the law and facts.

The special laws concerning the assessment and collection of taxes in the city of New York, provide, beside the personal liability of the owner, that assessments for street improvements shall be a *lien or charge upon the lands improved* (2 *Laws* [*R. L.*] 1813, 407, § 175), and which lien or charge, by subsequent acts (1853 and 1871, *supra*) becomes fixed, as an incumbrance upon the lands, only from the time of the entry of the assessment in the designated offices.

Under these special laws, a lien upon the lands is created in the first instance, in the nature of a mortgage thereon (2 *R. L.* 446, § 271), which may be enforced by a sale of the land (*Laws of* 1824, 39, ch. 49).

Under the revised statutes it is made the *duty* of the collector of a tax, to levy the same by distress and sale of the goods and chattels of the person who ought to pay (2 *Rev. Stat.* 397, § 2). And, as we have seen, resort can be had to the lands, only in default of such goods and chattels. But under the acts applicable exclusively to the city of New York, no similar duty is imposed upon the officer clothed with authority to collect an assessment. The owner is liable upon demand to pay the sum assessed, and, in default of such

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payment, it is made *lawful* to levy the same by distress and sale of his goods and chattels (2 R. L. 1813, § 175). But nowhere is it *required* to be done. It is permission merely, and a cumulative remedy.

Nor does the right or power to sell the lands depend upon a deficiency of goods and chattels. The act of 1816 (ch. 115) provides, that on proof of neglect or refusal to pay, the corporation may proceed to sell. No attempt and failure to levy of the goods and chattels need be shown, nor any proceeding whatever, to enforce personal liability.

It is evident, therefore, that in this city, unlike other parts of the State where the Revised Statutes apply, the land, if not the primary fund, is at least cotemporaneous with the personal liability. Resort may be had to either in the first instance, except that a preliminary demand must be made of the owner, if he can be found, before proceeding to sell the land; and when the land is resorted to in the first instance, it necessarily extinguishes the personal liability.

Under this state of the law in this city, it became important that a time should be definitely fixed when the lien should become complete, and a record made which should be open to public inspection. In the innumerable sales and transfers of real property in this city, it affords a marked facility to purchasers to ascertain with certainty the condition of the title they buy; and determine with equal precision upon whom the burthen of payment shall fall.

Not only is the law, applicable to the case before us, entirely different from the statutes under which the Rundell case was decided, but the facts are also different.

The agreement in that case had reference to the personal liability of the grantors to pay the tax. There was no lien on the land, therefore the sale was not subject to a lien. The personal obligation to pay re-

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Opinion of the Court, by MONELL, Ch. J.

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mained, notwithstanding the sale; and, in the view of the court, was collectable of the grantor after the sale.

In the agreement which the parties to this action made, it is very clear that they intended that the payment of the assessment, by the grantor or grantee, should depend upon the actual existence of it as an incumbrance, when the covenant was made. It was not their design to test the grantor's liability by any fact other than such as the record in the bureau of arrears would furnish. If at the delivery of the deed the assessment had become a lien, then, under the grantor's covenants, he was bound to pay. If not a lien, there was not any breach of the covenant.

It is therefore clear that the agreement in this case can not have the interpretation or force and effect that was given to the agreement in the Rundell case; and the liability of the plaintiff under his contract is to be determined by the single fact or question, whether the lien existed when he conveyed the lot; and not upon any possible supposed liability fixed by the imposition of the tax.

Under this construction of their agreement, and under the laws fixing the time when an assessment becomes a lien, there was no incumbrance on the land for which the plaintiff was liable.

If I am correct in my conclusion that the agreement of these parties was founded upon the covenant against incumbrances, then the case of Dowdney v. The Mayor, &c., of N. Y. (*ubi supra*), is applicable and decisive.

In that case, like the one before us, the entry of the assessment was made in the proper office after the conveyance, and the court held that it was not a lien or incumbrance within the meaning of the covenant against taxes, assessments, &c.

There is a further view pressed upon our attention by the defendant's counsel.

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Opinion of the Court, by MONELL, Ch. J.

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He claims that beyond all other considerations there is a strong equitable reason for charging the assessment upon the plaintiff.

The work was finished, and the property received the direct and immediate benefit of the improvement, several months previous to the sale. It is claimed that such benefit was equal to the amount assessed, and was added by the owner to the price demanded for the property.

It does not appear, however, that either party considered the subject of the improvement in any aspect. The plaintiff was absent during the interval between the completion of the work and making the contract of sale; and there is no evidence that he knew or had any information in respect to it. And it does not appear that the defendant made it any part of his examination, or estimated it in the price he agreed to pay. In short, the supposed beneficial effect of the improvement does not seem to have influenced either party in the purchase and sale.

Nor can a different conclusion be drawn from the fact that, prior to the contract, the apportionment of the assessment had actually been made; and that prior to the deed, the expense of the improvement had been ascertained by the assessors, and their assessment confirmed by the board of revision, and duly filed.

There is no evidence to warrant the conclusion that the existence of these facts influenced either of the parties in any degree, in the contract of sale, or in the delivery and acceptance of the deed.

In support of this equity we were referred to *Post v. Leet* (8 *Paige*, 337), where a purchaser at a master's sale was relieved from his bid by the existence of a large unconfirmed assessment. But it was put upon the ground that the bid was made under a mistake as to the facts of the case, and that the buyer was actually misled by the written terms of sale.

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Opinion of the Court, by MONELL, Ch. J.

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There are no such features in the case before us.

Another case decided by a referee to which we were also referred (*Cranston v. Mason*), has also this essential difference. The action was upon the covenant against incumbrances; and the referee found as a fact, that at the time of the delivery of the deed the grantor informed the purchaser that all taxes, assessments, charges, and incumbrances on the property had been paid, and that there were no incumbrances of any kind on the property. That this fact had great influence upon the learned referee, is to be seen from his version of it in his written opinion, where he says the defendant gave the plaintiff to understand that the street improvements had been paid for, and that there was no charge or incumbrance on the lots in consequence of those improvements.

But the referee was unable to distinguish *Rundell v. Lakey* (*supra*) and thought it a controlling authority. In that, I think, he was in error; and as his general conclusion rested upon a mistaken view of the liability incurred, his results must fall for the want of adequate support.

The law has provided a record open to the public, which is the only safe guide in the multitudinous transactions in real estate in this city. An assessment for a street improvement can not become a lien on land until it is made such record; and no one is required, be he seller or purchaser, to look beyond or behind that record. If he finds no confirmation, then he is protected; and it is enough to say that in common practice the search for liens and incumbrances does not extend beyond the bureau where the record must be kept.

If parties desire further protection they must secure it by their contracts.

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Statement of the Case.

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The plaintiff should have judgment upon the verdict, with costs.

CURTIS and SPEIR, JJ., concurred.

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LEWIS ROBERTS, PLAINTIFF AND APPELLANT, v.  
HENRY WHITE, AND ANOTHER, EX'RS, &C.,  
DEFENDANTS AND RESPONDENTS.

ENTRY OF JUDGMENT, REGULARITY OF.

Upon the trial of an issue of fact by the court, its decision shall be given in writing, &c. (*Code*, § 267).

The decision is a judicial act, and is complete when reduced to writing. Whatever remains to be done, is a mere clerical act to be done by the clerk, to wit: entry of judgment.

Reducing the decision to writing, concludes the trial, and authorizes the judgment and completes the official act of the judge, and the decision could be filed and the judgment be entered by the clerk at any time afterwards.

The expiration of the judicial term of the judge, after the decision, yet before such filing of the same and entry of the judgment thereupon, would not make such entry irregular.

A decision in writing that contains more than is authorized by law, may be modified by the court, on the motion of the party in whose favor it was rendered, by omitting therefrom so much as was erroneous, and retaining so much as was authorized by law.

The special term can thus modify a decision, and direct the court to enter a judgment upon it, in a modified form.

The party against whom the same was rendered, is not prejudiced by such a modification and entry. But such a judgment should not be entered as of an anterior date. Such an entry might affect the rights of others not parties.



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Statement of the Case.

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Before MONELL, Ch. J., and CURTIS and SPEIR, JJ.

*Decided May 3, 1875.*

Appeal from a judgment and order.

The action was to obtain an injunction restraining the defendants from interfering with a party wall. It was tried at special term in February, 1863, by the late Chief Justice BARBOUR, without a jury. He made and signed his findings of fact and conclusions of law, but they were not filed during his continuance in office. His term expired December 31, 1873.

The conclusions of law were: "That the defendants are entitled to a reference to ascertain what, if any, damages they have sustained by reason of the injunction issued at the instance and on behalf of the plaintiff herein; and, that the defendants are entitled to judgment against said plaintiff for the amount of said damages, and for a dismissal of the complaint herein and for costs."

In June, 1874, upon the defendants' application to the special term, it was "ordered that the said decision be filed, and that judgment be entered thereon, *nunc pro tunc*, directing the dismissal of the complaint in this action with costs to be adjusted, said judgment to be settled as to form upon two days' notice."

Judgment was thereupon entered against the plaintiff, dismissing the complaint and for costs.

No reference was had to ascertain the damages by reason of the injunction, or if had, no judgment was entered thereupon; and it was conceded, under the authority of *Leavitt v. Dabney* (9 *Abb. Pr. N. S.* 374-384), that so much of the conclusions of law as directed a reference to ascertain the damages, and as awarded judgment therefor, was erroneous.

The judgment under the order of the special term was entered as of October 5, 1865.

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Opinion of the Court, by MONELL, Ch. J.

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The plaintiff appealed from the order and judgment.

*C. Tracy* and *U. R. Martin*, for appellant.

*W. A. Butler* and *P. W. Ostrander*, for respondents.

BY THE COURT.—MONELL, Ch. J.—The judgment as entered, being merely for a dismissal of the complaint and for costs, no question arises upon it, except as to the regularity of its entry. The error in directing a reference before judgment, and awarding damages as part of the judgment, was not repeated in the judgment as entered.

It is now claimed—and the appeal from the order of the special term furnishes the facts and presents the question—that no judgment could be entered upon the decision of the justice who tried the cause, after the expiration of his term of office.

Upon the trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law (*Code*, § 267).

The decision is a judicial act, and is completed when reduced to writing. Whatever remains to be done is a mere clerical act.

The same section of the Code (267) provides, that judgment upon the decision shall be entered accordingly; and it is the duty of the clerk to make the entry (*Schenectady, &c. Pl. R. Co. v. Thatcher*, 6 *How. Pr.* 226; *Loeschigk v. Addison*, 3 *Robt.* 331, 338).

Reducing the decision to writing concludes the trial and authorizes the judgment. No *allocatur* of the justice is required. The clerk on filing the decision enters the judgment strictly in conformity with the decision.

It is very clear, I think, that when the late chief

justice reduced his findings of fact and law to writing, and subscribed them with his name and office—as he did in this case—he had completed the trial and the clerk was authorized at once to enter the appropriate judgment. Had he done so, any errors in it could have been corrected only on appeal. The judgment would have been entirely regular.

If, therefore, the only remaining duty was upon the clerk, he could discharge it at any time afterwards; and no lapse of time, nor the expiration of the judicial term of the justice, would render the entry irregular.

The omission to enter the judgment was caused, as it appears, by the reference which was ordered to ascertain the damages. Until the referee made his report, no final or complete judgment under the decision could be entered. But it was competent for the defendants to waive the reference and consent to a judgment in a modified form, omitting so much as was erroneous, and retaining so much only as was authorized by law.

It was necessary, or at least proper, therefore, for the defendants to go to the special term for an order modifying the decision, and authorizing the clerk to enter a judgment upon it in a modified form.

As it was, before the order of the special term, it might be regarded as only an *interlocutory* decision, which would remain in *abeyance* until the damages were ascertained, when the final judgment could be entered. In that case, no other judge of the court could continue the trial and pronounce the final judgment (Chamberlain v. Dempsey, 15 Abb. 1).

By waiving the reference, however, and surrendering so much of the decision as provided for the damages to be ascertained by the reference, the court had power to authorize the clerk to enter final judgment upon the decision. And the exercise of such authority was not an unlawful or improper act of the court.

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Opinion of the Court, by MONELL, Ch. J.

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I can not find any irregularity in the entry of judgment. The plaintiff has not, and can not be prejudiced by its modified form, and the order authorizing the modification was correct.

But I am not satisfied that it was correct to direct the judgment to be entered as of an anterior date. Even the power to do so was questioned in *Moore v. Westervelt* (14 *How. Pr.* 279), and I can discover no reason for it in the present case. It may affect the rights of others, not parties, and can conserve no important purpose of the defendants.

I think the order in that respect should be changed, and that the special term should, if the plaintiff desires it, direct the entry of judgment to be altered accordingly.

The judgment and the order (as modified) should be affirmed, with costs.

CURTIS and SPEER, JJ., concurred.

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Statement of the Case.

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JOHN SCHREYER, PLAINTIFF AND APPELLANT,  
v. THE MAYOR, &c., OF NEW YORK, ET AL.,  
DEFENDANTS AND RESPONDENTS.

**AMENDMENTS TO PLEADINGS.**

The code, by its provisions in regard to amendments, protects parties when errors occur and mistakes are made, and when a case comes within the scope of its provisions, and there is no bad faith nor wanton delays imputed to the party applicant, and the defense proposed is not an unconscionable one, the court should always permit the amendment.

The court has the power to allow any allegation material to the case to be inserted in the answer, although the effect may be to change the defense ; and when a new trial has been ordered the court has the same power to allow the parties to amend their pleadings as before the trial.

Is an order of this character the subject of review on appeal ?

*Held*, by MONELL, Ch. J., in his concurring opinion, that this order was clearly non-appealable, citing and discussing *Bowman v. De Peyster* (2 *Daly*, 203), and *Simmons v. Lyons* (35 *Supr. Ct.* 555, and 55 *N. Y.* 671), and other cases.

Before MONELL, Ch. J., and CURTIS and SPEIR, JJ.

*Decided May 3, 1875.*

Appeal from an order granting defendants' motion for leave to amend their answer.

*D. M. Porter*, for appellant.

*D. J. Dean*, of counsel, and *E. Delafield Smith*, Counsel to Corporation, for respondents.

BY THE COURT.—CURTIS, J.—The complaint alleges that the Mayor, Aldermen and Commonalty of the city

of New York, "through the school trustees of the tenth ward in said city, such board being requested to do so through the then board of public instruction in said city, now the board of education" entered into contract, with Alonzo Dutch, by which he agreed to build a school-house, and the mayor, &c., of the city of New York, agreed to pay therefor the sum of \$20,000 in eight installments.

The complaint then averred the assignment of the contract to the plaintiff; the completion of the building by him; and that the eight installments payable under the contract was due and unpaid to him.

By the answer, it was admitted that the contract was made as alleged in the complaint.

The cause was tried in October, 1874.

The plaintiff put in evidence the contract.

It then appeared that the contract was made by "The school trustees of the tenth ward," and that the mayor, &c., of the city of New York was not a party thereto.

The court dismissed the complaint upon the ground that the contract sued upon was not the contract of the defendants, following the decision of this court in *Ham v. The Mayor* (37 *Sup'r Ct.* 458), and the attention of the court not having been called by either party to the admission in the defendant's answer.

Upon appeal the court held that the defendants were precluded by the admission contained in the pleadings, from denying that the school trustees were their agents, and that they were bound by the contract in question; a new trial was therefore ordered.

These defendants immediately moved at special term for leave to amend their answer, by denying the making of the contract by them, and by striking therefrom the admission of making such contract, and each and every admission that the school trustees were

Opinion of the Court, by CURTIS, J.

agents of the defendants, or authorized to make contracts on their behalf.

The motion was made upon the pleadings and proceedings in the action, the printed case on appeal, and an affidavit stating that the admissions contained in the original answer were made in consequence of misapprehension on the part of the pleader of the legal relations of the school trustees to the mayor, alderman, and commonalty of New York, and before the decision heretofore referred to respecting such rights and liabilities had been made. The motion was granted upon terms and the plaintiff appeals.

In consequence of the frequent legislative enactments, affecting the system of public instruction, and the legal relations of the city government to it, many serious difficulties and questions have arisen. In preparing the answer, the pleader fell into an error, which under the circumstances was very natural, and which was mainly due to the existence of these complications and questions.

It was intimated at the general term, when the new trial was granted, that the only remedy for the defendants, was to apply for leave to amend their answer. Such leave has been granted, and the plaintiff on the appeal, claims that it, in effect, allows a new defense, and can not be permitted; and further that the court can only allow an amendment, when it is "in furtherance of justice," and that the amendment asked for is not of such character.

The provisions of the code authorizing amendments, were intended to protect parties when errors had occurred, and mistakes been made. This application seeks its remedial protection, and comes within the scope of its provisions. No bad faith, and no wanton delays are imputed to the defendants. If the court has the power, and the defense is not an unconscionable one, the amendment should be allowed.

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Opinion of the Court, by CURTIS, J.

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It seems to be clearly settled, that the court has the power in its discretion, to allow any allegation material to the case, to be inserted in the answer, though the effect may be to change the defense ; and that when a new trial has been ordered, the court has the same power to allow the parties to amend their pleadings, as though the action had never been tried.

It was the intention of the legislature, and the language of the code indicates, that the answer or statement of defense, might be amended so as to enable a defendant to avail himself of all of his defenses on the trial. Where by error or ignorance a party might be unable to present his entire case, or to avail himself of all of his defenses at the trial, the court has power to grant relief upon such terms, and in such cases as may be just (*Union National Bank of Troy v. Bassett*, 3 *Abb. N. S.* 359 ; *Brown v. Leigh*, 49 *N. Y.* 78 ; *Troy v. Boston R. R. Co. v. Tibbits*, 11 *How. Pr.* 168).

It is urged on the part of the plaintiff, that the amendment should not be granted, because it seeks to defeat an honest claim for work of which the city has had the benefit, by interposing a legal technicality. If this doctrine, held in *Ham v. The Mayor* (37 *Sup'r Ct.* 458) is correct, that the department of public instruction possessed the powers and privileges of a corporation ; that it was not a part of the integral government of the municipal corporation ; that its powers and duties were imposed by statute and to be executed as the representative, and for the purposes of the state government, in administering its system of common schools ; and that the public moneys of the state apportioned to the counties of New York, among others counties were applied to its expenditures, then it would be unjust to make the city of New York liable for contracts made for and on behalf of the state government by the representatives, and for the purposes of the state.

It is not proposed at this stage of the action to pass



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Concurring opinion of MONELL, Ch. J.

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upon its merits, but simply to show, that we can not now undertake to determine what are the equities, or the legal rights of the parties in the litigation, but that it sufficiently appears that the amendment sought is not of such an unconscionable character that it should for that reason be refused.

The order appealed from is affirmed, with costs to respondents, to abide the event of the action.

SPEIR, J., concurred.

MONELL, CH. J. (concurring in the conclusion of the Court).—Without examining the merits of the questions presented upon this appeal, I am satisfied that the order was so wholly discretionary, and did not involve the merits of the action, or affect a substantial right, that it is not the subject of review on appeal.

This subject was fully considered in the Common Pleas in *Bowman v. De Peyster* (2 *Daly* 203), which was precisely like the case before us, and it was there held that the order was not appealable.

But later, in this court (*Simmons v. Lyons*, 35 *Sup'r Ct.* 555), a motion granted at the trial to amend the complaint by the insertion of new and material allegations, was held to be so within the discretion of the court, that the decision could not be reviewed. The court there say, "the amendment being within the power of the court, was also within the discretion of court, and can not be reviewed on appeal from the judgment." That case was affirmed in the Court of Appeals, "on the opinion in the court below" (55 *N. Y.* 671).

The cases in which the right of appeal has been sustained, have chiefly been on the ground, that the court has not the *power* to make the amendment (*Sheldon v. Adams*, 27 *How. Pr.* 179).

But in all cases where the power existed, the court

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Concurring opinion of MONELL, Ch. J.

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has refused to entertain an appeal, unless from some stringent provision in the order, or from its necessary effect, the party was deprived of some substantial right (*Harrington v. Slade*, 22 *Barb.* 161; *Union Bank v. Mott*, 19 *Hov. Pr.* 115).

The case of the *N. Y. Ice Co. v. N. West. Ins. Co.* 23 *N. Y.* 357), which is relied upon in *Simmons v. Lyon* (*supra*), must be considered as affirmed by the same court. The language of that case is clear and explicit. Judge Comstock says (p. 362): "In the next place, I am of opinion that the Supreme Court had no right to entertain the appeal *at all* from the order of the special term. That order, in its substance and nature, simply allowed a pleading to be amended in furtherance of the justice of the case. Such orders rest in the discretion of the court which makes them, they involve no substantial right, and they are not reviewable on appeal. They do not belong to either class of orders which, according to the Code, may be re-examined at the general term (§ 349)."

In the case before us, the defendants move for leave to amend their answer, by striking out an admission, and inserting in its stead a denial of the contract set forth in the complaint as being their contract. The granting of such a motion was discretionary; and no right of the plaintiff could be substantially affected, if it was granted. If it was in furtherance of justice, the court was, perhaps, bound to grant it, and the plaintiff can not complain that instead of resting upon the defendants' admission, he must now prove his case.

The order should be affirmed, with costs.

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Statement of the Case.

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**PHILIP S. JUSTICE, PLAINTIFF AND APPELLANT,  
v. WILLIAM B. LANG AND GEORGE M.  
WHEELER, DEFENDANTS AND RESPONDENTS.\***

This case has had three trials, and this is its third appeal to the general term.

Review, by the court, of the questions presented on the former trials and hearings (MONELL, Ch. J.).

Two findings of fact, by the referee, on the last trial, are (in the opinion of the court at general term) fully supported by the evidence, and conclusively and properly disposes of the case.

These findings are as follows:

“That said memorandum or agreement was not delivered absolutely, but only in the expectation and on the condition that a written order should be given by the plaintiff for two thousand rifles, and which was to embrace the one thousand rifles mentioned in said memorandum or agreement, in such a form as to make it a valid contract upon the plaintiff as well as upon the defendants; and that the understanding of both parties was at the time of said memorandum or agreement was delivered that the contract for the said rifles was incomplete and only to become perfect upon the receipt, by the defendants, of the written order from the plaintiff to procure for him the two thousand rifles mentioned and referred to, of which the said one thousand rifles were a part and parcel.”

“That at the time when the said defendants made, executed, and delivered to the plaintiff the memorandum or agreement in writing, bearing date on May 13, 1861, the said plaintiff did not accept the said agreement, absolutely and unconditionally, as a completed contract.”

Before MONELL, Ch. J., and CURTIS and SPEIR, JJ.

*Decided May 10, 1875.*

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\* This case was decided on this last appeal, substantially upon the findings of fact of the referee; but as it reviews the former trials and hearings, it is deemed worthy of reporting, that its professional history may be completed. &c.

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Opinion of the Court, by MONELL, Ch. J.

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Appeal from judgment entered upon the report of a referee.

*E. Terry*, for appellant.

*Oscar Smedburg*, for respondents.

BY THE COURT.—MONELL, Ch. J.—Upon the first appeal in this case (42 *N. Y.* 493) the court held that the memorandum signed by the defendants was sufficient to constitute a valid contract, within the statute of frauds, if there was a consideration therefor moving to the defendants; and that an acceptance of the memorandum by the plaintiff, and a promise, express or implied, to accept and pay for the guns, was a sufficient consideration. And it seems to have been assumed by the court that there was evidence of such acceptance and promise, and a new trial was ordered.

Upon the second trial the submission to the jury was confined to the question of damages. The court refused to submit to them whether there had been an express or implied promise to accept and pay, not on the ground that there was no dispute in the evidence, but that such promise was to be necessarily implied from the circumstance of the plaintiff's receiving the memorandum from the defendants, about which there was no dispute.

Upon the *second* appeal (52 *N. Y.* 323) the court affirming the former decision sustaining the validity of the contract, has left the only remaining question that of consideration, which as the case then presented itself, was held to be one of fact for the jury.

I have not been able to discover any essential difference in the evidence as given on the second and last trial. The effort of the defendants on each occasion, has been to establish that the delivery of the memorandum was upon a condition not fulfilled by the plaintiff.

The answer of the defendants alleges, that the

plaintiff agreed to give a written order for the one thousand rifles, and to give a further order for one thousand more, to be accompanied with a letter of credit; and that upon that condition the memorandum was delivered to the plaintiff. The evidence shows that the plaintiff declined, for a reason stated, to give the written order until his return to Philadelphia, but promised to send it from that place.

The dispute arises as to whether the order was to be for one thousand or for two thousand rifles. The defendants insist that the condition was, that the order should embrace both lots, and should be for two thousand rifles, including the one thousand mentioned in the memorandum, and the one thousand which was to be the further order. While the plaintiff avers that the only order he was to give, was for the second lot of one thousand, insisting that the contract for the first one thousand was complete by his acceptance of the written memorandum.

The presumptions which arise from facts are not presumptions of law, but of fact. A jury might infer from circumstances that the plaintiff had promised to accept and pay for the one thousand rifles mentioned in the memorandum. Even though they found the order related to the last one thousand rifles, they might, looking at the manner of delivery of the memorandum, have, perhaps, implied from it a promise to pay.

But, as the court say, that being a presumption of fact, must be decided by the jury "under the rule which so clearly separates the office of the judge from that of the jury."

The theory of the plaintiff, that, if the order referred or related to the second lot of rifles, so as not to make it a condition affecting the first or memorandum lot, there was sufficient other evidence from which could fairly be inferred that he had promised to accept and pay for the first lot, made it no less a question for the

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Opinion of the Court, by MONELL, Ch. J.

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jury, and raised no presumption of law, which could authorize the court to dispose of it. Neither would such an inference, or a positive finding of a promise to pay, necessarily destroy the other defense, that although there may have been a promise by the plaintiff, the defendant's promise was upon a precedent condition, which had not been fulfilled.

The defense was, that the memorandum was not to take effect as a contract, until the plaintiff had given the order for the two thousand rifles; and the referee has found as a fact, "that the memorandum or agreement was not delivered absolutely, but only in the expectation and on the condition that a written order should be given by the plaintiff for two thousand rifles, and which was to embrace the one thousand rifles mentioned in the memorandum or agreement, in such a form as to make it a valid contract upon the plaintiff as well as upon the defendants; and that the understanding of both parties was, at the time the memorandum or agreement was delivered, that the contract for the rifles was incomplete, and only to become perfect upon the receipt by the defendants of the written order from the plaintiff to procure for him the two thousand rifles mentioned and referred to, of which the one thousand rifles were a part."

This finding, it seems to me, conclusively disposes of the plaintiff's case, if it is fairly supported by the evidence, and I think it is.

But there is another finding by the referee which comprehends the whole ground of action, and destroys the only basis on which the memorandum can be sustained under the statute.

The referee finds that the plaintiff did not, at the time the memorandum was delivered to him, accept it absolutely and unconditionally as a completed contract, and *did not agree at that time to be bound by its terms.*

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Opinion of the Court, by MONELL, Ch. J.

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This latter finding disposes of any alleged implied, or express promise to accept or pay for the rifles referred to in the memorandum.

The appellant claims that the interpolation of some words, in an extract from the opinion of the court upon the last appeal, has led to the error which he insists the referee has fallen into.

The court say the jury might have found that a written order should be given by the plaintiff, and the referee has added as if a part of the opinion—“*for two thousand rifles, being for one thousand in addition to those mentioned in the memorandum.*” But the court had just previously alluded to what the plaintiff had said—“I want to order two thousand rifles,”—upon the strength of which, and a representation concerning the capacity of Birmingham, for the manufacture of rifles, the defendants consented to take an order for *two thousand* guns. The memorandum was then delivered, the defendants saying, “Give me the order.”

The order, therefore, which the court say the jury might have found, was the order for *two thousand* guns, which would of course cover the one thousand mentioned in the memorandum. The words interpolated by the referee, are not inconsistent with, but as an amplification of the meaning of the court, in its reference to the order which might be found from the evidence.

The effect of this allusion to an order for two thousand rifles, to include the one thousand specified in the memorandum, was not that the first contract was, or was to be for two thousand rifles. The second lot was a *further* order—in addition to the first lot—it was spoken of at the same time, and the plaintiff promised that the order to be sent from Philadelphia, should cover both the first and the further lots, making in all two thousand rifles. This is a legitimate inference from all the evidence; and I have failed to find the attempt

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Opinion of the Court, by MONELL, Ch. J.

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anywhere made, to make the memorandum cover the two thousand rifles. The second lot was yet to be ordered, and the order was promised to be sent. The parties did not regard it, and the court has nowhere so construed or treated it, as changing a contract for one thousand guns, into a contract for two thousand guns. The contract for the first lot was to be complete upon receiving the order for the two thousand, which was to include the first lot, but the defendants were, probably, not bound to accept the entire order, and could have rejected the second lot, retaining the order as consummating and completing the agreement for the first thousand. But even if the condition was that the order should be for two thousand rifles, and that the memorandum for one thousand should be incomplete, as a contract, until the condition was fulfilled, it was a lawful condition, and the plaintiff in default of complying with it, has no means of otherwise furnishing the necessary consideration to satisfy the statute of frauds.

The question left by the court of appeals as the only question to be disposed of, namely, whether there was a promise of the plaintiff to accept, and pay for the guns specified in the memorandum, has been, it seems to me, fully and carefully considered by the referee upon all the evidence in the case. He was authorized to give importance and prominence to the evidence tending to establish the existence of a condition precedent as affecting the memorandum; and having found against the plaintiff on that question, upon evidence sufficiently conflicting to bring his decision within the well recognized rule in regard to the review of questions of fact, it should not be disturbed.

It does not, in my judgment, affect the question, that the order embraced, or was to embrace, more than the one thousand guns specified in the memorandum. It was essential to the validity of the contract, than an



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Dissenting opinion of SPEIR, J.

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order for the first lot should be given, and it is quite immaterial, whether it was separately given, or was included in one general order for both lots.

Nor is the defense weakened by the action of the defendants in immediately upon the delivery of the memorandum, proceeding with measures to fulfill their part of the agreement. Trusting to the promise of the plaintiff to give vitality to the contract, by sending his written order from Philadelphia, they were justified in being active, as their time for delivery was limited.

In conclusion I believe that the case has been fairly decided. The plaintiff was endeavoring to recover a loss of profit only. He had parted with neither money nor value; and as the referee has decided, incurred no corresponding liability to the defendants. He was bound, therefore, to show a clear right to recover. Not having done so he must submit to the judgment against him.

The judgment should be affirmed.

CURTIS, J., concurred.

SPEIR, J. (dissenting).—The following memorandum or instrument in writing signed by the defendants is the alleged contract on which the plaintiff brought his action for the recovery of damages for the non-performance of the contract.

“New York May 13, 1861. We agree to deliver P. S. Justice one thousand Enfield rifles, no other extras, in New York at eighteen dollars each, cash upon such delivery. Said rifles to be shipped from Liverpool not later than the 1st of July, and before if possible.  
W. BAILEY LANG & Co.”

It is of the first importance to clearly understand and keep before our minds what the court of last resort has actually settled as the law of this case. After two arguments and upon a full consideration, it was sol-

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Dissenting opinion of SPEIR, J.

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emly decided by the court that the signing of this instrument by the vendors, the contract was taken out of the statute of frauds and binds the defendants, although it was not signed by the plaintiff; and it was consequently held that it was a valid instrument binding the defendants to deliver the rifles according to its terms, and that the contract was supported by a sufficient consideration (*Justice v. Lang*, 42 *N. Y.* 493).

The case was again tried, and the above adjudication was followed, and the plaintiff obtained a verdict and judgment which was affirmed by the general term of this court. An appeal was taken from this judgment to the court of appeals which was reversed and a new trial ordered. A new trial was had before the referee, who has found for the defendants, and an appeal is now taken from the referee's decision.

By the last decision of the court of appeals, reported in 52 *N. Y.* 323, the learned judge adopts the conclusions the court had come to on the former appeal, as binding in this case; and at the outset, in disposing of the case, it is conceded, as before decided, that the contract was supported by a sufficient consideration in the implied verbal promise of the plaintiff to accept and pay for the rifles. The judge, on the trial which was last before the court for review, refused to submit to the jury any questions except those relating to damages, to which the defendants excepted. This was held to be error, for the reason if the plaintiff was entitled to recover it must be upon the theory that the written promise of the defendants, and the verbal promise of the plaintiff at the same time with the written promise, constituted together a consummated agreement upon which the defendants have been charged; and the court held that it was a question for the jury to determine whether there was an agreement by plaintiff to receive and pay for the thousand rifles.

The only question, therefore, which now comes be-

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Dissenting opinion of SPEIR, J.

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fore us, is the one discussed by the learned judge in his opinion—whether there was such a promise. As the case then stood, the evidence was conflicting and it was for the jury to pass upon. Our attention is now called to a review of the evidence and findings of the referee.

The plaintiff and the defendant Wheeler, are the main witnesses who testify to the circumstances under which the contract was made, and who were present at the time.

There is no discrepancy between them in the following particulars. They agree that the paper or contract was drawn up and signed by Wheeler; a copy made by him and delivered to the plaintiff, who took it away with him, Wheeler retaining a copy or the original; that Wheeler wrote the letter to Goodman at the same time, of the same date as the contract, and deposited it in the post, which went by the mail on the following morning; that the defendants were the agents of Scofield & Goodman, and conducted their business in New York; that Goodman was chairman or president of the Birmingham Small Arms Company; and that the defendants, as agents for Scofield & Goodman (as testified to by Goodman), from time to time sent orders to them for guns.

The single point in controversy between the parties may be stated as follows:

The plaintiff claims that the contract signed by the defendants and delivered to him was completed and binding, and so understood by both parties at the time; that no written order was to be given by him to the defendants for the one thousand rifles mentioned in the contract; that the parties then acted upon the paper as a consummated contract; and that the other order spoken of was to go with a letter of credit to provide for the payment in England of another one thousand, which was contemplated and discussed by the

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Dissenting opinion of SPEIR, J.

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parties, but not then settled by any agreement between them.

The defendants' position is that the paper signed by them was only a conditional contract, and was not delivered absolutely, but on the expectation that a written order for two thousand rifles should be delivered to them, together with a letter of credit for the payment in England, for an additional one thousand rifles, besides the one thousand named in the contract. All the testimony in the case has been introduced by the respective parties to establish these positions as respectively claimed by each.

Bearing in mind that the decision of the court adopted by the learned judge in this case, was that "if the contract was then consummated it is to be deemed valid in law," then all prior negotiations were merged in the contract thus made. In order to ascertain whether there was such a promise which would support a sufficient consideration, we must direct our attention to the evidence, which shows what occurred at the time when and after the paper was signed and delivered.

Wheeler says he said to the plaintiff, after having signed and read it to him, "I want to add at the bottom of this, that we shall not be held for these rifles, in case they do not come. He (plaintiff) said to me, 'Do not put that on there. If you do you will spoil it.' I want to show that all is right." On the part of the defendant, this precaution can be only explained on the ground that the contract bound him, and he was providing against his liability. The objection of the plaintiff doing so, is intelligible only on the ground that the contract would lose its binding force by such an insertion.

When the contract was signed and delivered, the defendants took immediate action by sending forward a letter written by them to their agents in England: "Please put in hand at once, the one thousand ahead

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Dissenting opinion of SPEIR, J.

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of Syms (as with him I have held out no inducement for delivery), and get them off by invoice and bill of lading in our name, that I may not be brought in for damages, if the contract is not complied with." There is no evidence in the case, that plaintiff knew the contents of this letter.

On the following day, May 14th, Wheeler writes to Goodman: "Justice has given me an order for two thousand, one thousand of which I have agreed shall be shipped not later than the first of July, from Liverpool, . . . and I shall be extremely anxious until you ship this thousand for Justice, as unless you do we shall be brought in for damages; a letter of credit will go out by the next mail; if you have not one thousand in yours works to finish up in the time specified, get them from others, *as this order must be filled by us.*"

On May 16th, Wheeler writes to plaintiff, to send him the letter of credit to go by the Wednesday's steamer, also the order, and says he should have made one stipulation, "in that contract made with you," that he should throw in *one* of those *ponies* out of the lot he has. This letter is answered by the plaintiff, May 21st: "I tried to arrange for your credit to-day, not because it was part of the agreement, but to oblige you. It was specially stated, if I ordered another thousand, I would provide another means of payment, viz., in England; and he says the money is deposited with a banker, for thousand ordered of you, payable to my order on delivery of the rifles, and adds, 'I will throw in the pony if the guns are delivered to me before July 1st, *sure.*'" On May 20th defendants wrote to Shipley, their agent: "Justice gave me an order which went out last week for one thousand, and was to give another order to go this week for another one thousand, with his letter of credit for the last lot, and, perhaps, for both. Please see about this, and telegraph us if he has not already

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Dissenting opinion of SPETA, J.

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written us." And on May 23rd, Wheeler writes to Shipley: "The Connecticut order has been nobly cancelled. Justice can but do the same. It is represented that English steamers refuse to bring any more arms to America. If this is true, I am precluded from filling the order, as I did not fix delivery here, but shipment from Liverpool." The letters of May 13th, 20th, and 23rd, were not on the former trials put in evidence.

There is no evidence in the case establishing any contract between the parties for the sale of two thousand rifles. There is, then, no such contract. It is true the parties contemplated entering into an arrangement, the effect of which would be, if adopted, to add one thousand rifles more, which should be paid for by a letter of credit in England, and an order for the same. This arrangement was put an end to by the plaintiff's letter, May 21st. So as to this, the defendants had distinct notice when they wrote to their agent Shipley, that the Connecticut order had been cancelled, and plaintiff "can but do the same."

The letter of May 20th, written by the defendant to his agent Shipley, states precisely what the contract was: "*Justice gave me an order which went out last week for one thousand, and was to give me another order to go this week for another one thousand, with his letter of credit for the last lot, and perhaps for both.*" Here is a complete statement of the whole matter. He treated the contract in his possession as a sufficient order to act upon, and he did so act. He expected an order from the plaintiff for another one thousand, with his letter of credit for the last one thousand. He was anxious to have this contract with the plaintiff cancelled, as the Connecticut order had been nobly done. I think it would be a want of proper appreciation of the intelligence and experience of these parties as merchants, to believe that all this correspondence relating to a matter of such importance,

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Statement of the Case.

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could be conducted by them without being fully aware of their liability under the contract in question.

The judgment should be reversed.

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THOMAS P. ELDRIDGE, ET AL., SURVIVORS, &C.,  
PLAINTIFFS AND RESPONDENTS, v. ADOLPH C.  
STRENZ, ET AL., DEFENDANTS AND APPELLANTS.

APPEAL PAPERS.

The general term on appeal, should have all the papers upon which the order appealed from was based, placed before it.

In this case the *remittitur* from the court of appeals to this court, which was before the special term, does not appear among the papers.

COSTS—EXTRA ALLOWANCE.

If the court before which the final determination in the case was had, does not direct an allowance in its judgment, there is no authority elsewhere to adjudge it (*McGregor v. Buell*, 1 *Keys*, 157, 158). The 56th rule of practice limits this application to the court before which the trial is had or the judgment rendered.

In the case at bar, the plaintiff recovered judgment after a trial before a jury, and an allowance was made to him. The defendant appealed to the general term of this court, and the judgment was recovered and a new trial ordered. From this decision the plaintiff appealed to the court of appeals, making the usual stipulation required, that absolute judgment should be rendered against him, if the judgment should be affirmed. It was affirmed, and on the *remittitur* to this court and on affidavit, the defendant moved at special term for an allowance, and the motion was denied. *Held*, no express provision of the code exists, that provides for an allowance in a case like the present, where a judgment has been rendered by the court of appeals under this form of stipulation; and as, from the nature of the proceeding, it might be often inequitable that there should be an allowance, it is more reasonable to consider that there should not be one

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Statement of the Case.

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granted than to seek for it from analogy and implication. Order of court below affirmed.

The legislature by the word "*defense*" in the 309th section of the code, meant something more than a case in which an answer or demurrer *only* was interposed ; it never contemplated that in such a case the plaintiff should be subjected to any greater payment of costs, than the usual fixed amount of taxable costs.

Ch. J. MONELL, in a dissenting opinion, holds substantially that in this and all other like cases, the special term of this court could exercise its discretion after the judgment of the court of appeals, and that in all cases where a defense (by pleading) had been interposed, an allowance to the successful party was within the discretion of the court.

Before MONELL, Ch. J., and CURTIS and SPEIR, JJ.

*Decided May 8, 1875.*

Appeal from an order of the special term denying defendant's motion for an extra allowance.

The action was to recover the amount of a promissory note. The issue formed by the defendant's answer was tried by a jury. The plaintiff had a verdict, and judgment was rendered in his favor. The court, granted plaintiff an extra allowance of two and one-half per cent. on the amount of the verdict.

The defendant appealed from the judgment to the general term, where the judgment was reversed and a new trial ordered, with costs to abide the event. From the judgment of the general term, the plaintiff appealed to the court of appeals, making the usual stipulation required, that absolute judgment should be rendered against him in case of affirmation of the judgment below. The court of appeals affirmed the judgment of the general term, and rendered absolute judgment in favor of defendant, and against the plaintiff for costs.

The judgment of the court of appeals was remitted to, and became the judgment of this court.

The defendant thereupon moved for an extra allow-



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Opinion of the Court, by CURTIS, J.

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ance of costs at the special term of this court, and the motion was denied for "*want of power in this court to grant the same, and for no other reason.*"

*Miller, Peet & Opdyke*, for appellants.

*G. A. Seixas*, for respondents.

BY THE COURT.—CURTIS, J.—It appears from an affidavit on the part of the plaintiff, that the plaintiff appealed to the Court of Appeals, from a judgment of the general term reversing a judgment of the special term in his favor, and granting a new trial, and stipulated that should the judgment appealed from be affirmed, judgment absolute should be rendered against him.

Under this stipulation, the Court of Appeals after a hearing, ordered judgment absolute against the plaintiff. The motion at special term for an allowance was made, not only upon the affidavit above referred to, but upon the *remittitur* from the Court of Appeals, which was presented to the judge, who made the order appealed from, and is referred to in that order.

The papers on this appeal, do not contain the *remittitur*, and the general term under the rules and practice of the court ought, on appeal, to have all the papers upon which the order appealed from is based, placed before it.

Especially is this the case, when the court is called upon to take some action incident to the judgment contained in that very *remittitur* from the Court of Appeals. Even if we had it before us, it does not seem clear that this court has any power to add any further adjudication or order to the judgment contained in that *remittitur*, or to supply any omission or defect. If that court before which the hearing or determination under the stipulation was had, does not direct an al-

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Opinion of the Court, by CURTIS, J.

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lowance in its judgment, there does not appear to be authority elsewhere to adjudge it (*McGregor v. Buell*, 1 *Keyes*, 157, 158). There is another difficulty in our attempting to pass upon it, as the 56th rule limits this application to the court before which the trial is had, or the judgment rendered.

No express provision of the code exists granting an allowance in a case like the present, where a judgment is rendered under this form of stipulation, and as from the nature of the proceeding it might be often inequitable that there should be an allowance, it is more reasonable to consider that the legislature intended that there should not be one granted, than to seek for it from analogy and implication.

In that class of cases, where the court has power to grant allowances provided for in the 309th section of the code, in which it is stated, they may be made "in difficult and extraordinary cases, where a defense has been interposed," there is reason to believe, that the legislature intended by the use of the word "defense" to mean something more than an answer or demurrer being interposed, as it may be claimed that it is employed in distinction from those terms; and if the legislature had intended to refer simply to the interposition of an answer or demurrer, it would, as in other instances throughout the code, have used those specific terms. In addition, it may be fairly assumed, that as in the current affairs of all enlightened communities, men are encouraged to seek a peaceful and just solution of questions and controversies, by commencing suits, the occasion for which often ceases on the interposition of merely an answer, that the legislature never contemplated that in such contingencies, a plaintiff should be subjected to any greater payment than the fixed and determined amount of costs which has usually been given. It can not be presumed that under such circumstances, it was intended to subject the plaintiff to

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Dissenting opinion of MONELL, Ch. J.

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the hazard of being obliged to pay in addition, sums that under the name of allowances, may be severe and ruinous to the law-abiding and peaceable suitor.

The order appealed from should be affirmed, with costs to the respondent.

SPEIR, J., concurred.

MONELL, Ch. J. (dissenting).—There is no restriction as to the time when an application for a further allowance may be made, except that it must be before the final costs are adjusted (*Rule 56*).

In this case the defendants were not in a condition to make the motion until judgment was entered upon the *remittitur* from the court of appeals. The trial before the jury resulted adversely to the defendant. In reversing the judgment and ordering a new trial, the costs of the appeal were made to abide the event of the second trial. But the plaintiff prevented the second trial by an appeal from the order.

The judgment of the court of appeals upon such appeal was the first and only absolute award of costs to the defendants.

They were, therefore, in time in making their motion. It could not be made at any previous time.

The question, therefore, upon this appeal is whether it was a case in which the court below could exercise its discretion.

The code permits the allowance to be made in cases, "where a defense has been interposed, or in such cases where a trial has been had."

I am of the opinion that, for the purposes of this question, a trial was had in the case, and, therefore, the court could have granted the extra allowance.

There was an actual trial of the issues before a jury, which resulted adversely to the defendant. That was the only trial had in the case.

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Dissenting opinion of MONELL, Ch. J.

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I do not regard the argument of the successive appeals as *trials* within the meaning of the law, as has been done in some cases (*Van Schaick v. Winne*, 8 *How. Pr.* 5 ; *Sutherland v. Tyler*, 11 *Id.* 251 ; *Seguine v. Seguine*, 3 *Abb. Pr. N. S.* 442). For such arguments and proceedings a compensation is fixed.

A trial is a judicial examination of the *issues*, whether of law or fact, and not a review of such examination upon an appeal from the decision. The appellate court corrects any errors of the trial. It has no original jurisdiction to try the issues, or to judicially examine them, further than to see that the judgment under review is correct. The only trial, therefore, is at the special term, before the court, with or without a jury.

The trial which was had in this case was sufficient, I think, to empower the court to grant the allowance.

The effect of the judgments upon the several appeals, is, that the judgment entered upon the verdict of the jury was erroneous—that it should have been for the defendants, or that the plaintiff's complaint should have been dismissed. Had there been such a result at the trial, the power to give the defendants a further allowance, could not be doubted. The effect is not lessened by having the errors of the trial corrected by the court upon the appeal ; and their judgment must be regarded as the judgment which ought to have been rendered on the trial.

For all purposes of costs, therefore, a trial was held in this case ; and the court had power to use its discretion upon the defendants' motion.

But further, I think a correct construction of the 309th section of the code gives power to the court in this case, irrespective of the actual trial.

A defense had been interposed.

The section, as amended in 1865, apparently provides for two cases,—*first*, where a defense has been in

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Dissenting opinion of MONELL, Ch. J.

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terposed, and, *second*, where a trial has been had ; so that the section may be read ;—in difficult and extraordinary cases where a defense has been interposed ; and in difficult and extraordinary cases where a trial has been had. But as there can not be a trial unless a defense has been interposed, the legislature meant to confer power on the courts to give the allowance in all cases where a defense was interposed, whether a trial was had or not. So that if the plaintiff discontinued the action before trial, the court could still grant the allowance. For the allowance is not merely to compensate for an actual trial, but also for the labor and expenses of preparing for the trial (*McQuade v. N. Y. & Erie R. R. Co.* 5 *Duer*, 613).

Had the legislature intended to restrict the power to cases of trial only, they would not have disconnected them, but would have provided that when a defense was interposed *and* a trial had, the allowance might be made.

For the reason, therefore, that a defense having been interposed, as well as for the reason that a trial had been had, the case is one in which the court in its discretion may make a further allowance of costs to the defendants.

The order should be reversed, and the special term should be allowed to exercise its discretion upon the motion.

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 Statement of the Case.
 

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JOHN A. MOODY, PLAINTIFF, v. ROBERT T.  
ANDREWS ET AL., DEFENDANTS.

PLEADINGS, ISSUES THEREIN—JUDGMENT ON THE SAME.

RIGHTS OF A PARTY, WHO LAWFULLY HOLDS A PROMISSORY NOTE AS A

• PLEDGE.

The admission in the answer, "that at the time mentioned in the complaint, they (the defendants) made and endorsed a note like that set forth therein," unaccompanied with anything tending to show that it was a distinct note from that described in the complaint, and on which the action is brought, must be held to refer to the note sued upon.

This answer does not put in issue plaintiff's allegation in the complaint, that he is the lawful holder of the note, but states facts that do show that the plaintiff is the *lawful holder of the note, for value*.

Where a party holds a note as a pledge, the law confers upon him the power to receive the whole money from the makers of the note, and sue and collect the same. The money, when received by him, is held as a substitute for the note, and subject to all the terms and conditions affecting it (*Garlick v. James*, 12 *John*. 146). When commercial paper is received as security, for an advance of money made upon it at the time, without notice of any defects of title, the law merchant, protects the transferee against all latent equities, whether of the parties to the paper or third persons (*Weaver v. Barden*, 49 *N. Y.* 294; *Muller v. Poudir*, 55 *N. Y.* 332). The pledgee of commercial paper, in the absence of any special power, is bound to hold it, and to collect it, and apply the money to pay the loan, and to account for, and to return the balance, if any remained (*Wheeler v. Newbould*, 16 *N. Y.* 392). The allegation in this answer to the effect that there are other parties claiming title to the note, or to the proceeds, are of no force. The proceeds of the note are to be reached through the plaintiff.

Before MONELL, Ch. J., and CURTIS and SPEIR, JJ.

*Decided May 3, 1875.*

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Statement of the Case.

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This action is against the makers of a promissory note.

The pleadings are as follows :

COMPLAINT.

“The complaint of the above named plaintiff respectfully shows to this court that at the several times hereinafter mentioned, the defendants were partners doing business under the firm name of Andrews & Sandford. That the said defendants heretofore at the city of New York made their promissory note in writing, bearing date on the 24th day of January, 1874, whereby he promised to pay six months after the date thereof to the order of themselves, for value received, the sum of sixteen hundred and sixty-six dollars and sixty-six cents, and the said defendants thereupon, and before the maturity thereof, endorsed the said note, and so endorsed, the same was passed and delivered to the plaintiff, and although the said note became due and payable before the commencement of this action, yet the defendants have not paid the same. And the plaintiff further says that he is now the lawful owner and holder of the said note, and that the defendants are justly indebted to him thereupon in the sum of sixteen hundred and sixty-six dollars and sixty-six cents principal, together with interest thereon from the 27th day of July, 1874.”

“Wherefore the plaintiff demands judgment against the defendants for the said principal sum and interest.”

ANSWER.

“These defendants, for answer to the said complaint, admit their partnership, and also that at the time mentioned in the complaint, they made and endorsed a note like that set forth therein, and that said note is not paid.”

“They deny each and every allegation in the said complaint not hereinbefore admitted.”

“These defendants further answering, aver that the

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Statement of the Case.

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said note so endorsed by them was delivered by them to one Mrs. Jennie Reynolds, who is now the lawful owner thereof."

"These defendants further aver that the said note was by the said Jennie Reynolds delivered to one James H. Dobbs for the purpose of having the same discounted for her and the proceeds thereof paid to her, but that the said James H. Dobbs did not have the same discounted, but without authority and out of the usual course of business, delivered the said note to the plaintiff as security for a small sum, to wit: the sum of one hundred dollars, loaned to him by the plaintiff."

"These defendants further aver that they have been notified by the said Jennie Reynolds not to pay the same, and that she claims the money due thereon."

"These defendants further aver that Alfred P. Reynolds, the husband of the said Jennie Reynolds, was duly adjudicated a bankrupt by the U. S. District Court, for the Southern District of New York in Bankruptcy, on or about the 1st day of March, 1874, as of the 20th of February, 1874, and that by an order made in said proceeding one Napoleon Godone claims to have been appointed assignee in bankruptcy of the effects of the said Alfred P. Reynolds."

"That the said Napoleon Godone has notified defendants that said note was the property of said Alfred P. Reynolds, and as such became and is now the property of the said Napoleon Godone, and has forbidden the payment thereof to anybody other than himself."

"These defendants aver that the said Jennie Reynolds and the said Napoleon Godone are necessary parties to this action and to a complete determination thereof, and pray that the plaintiff may be compelled to bring them into this action, and that an adjudication may be made herein which shall protect these defendants from the claims of the said several parties."



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Opinion of the Court, by CURTIS, J.

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On motion of plaintiff's counsel at the trial the court directed judgment on the pleadings for the plaintiff, for the amount of the note and interest, the exceptions to be heard in the first instance at the general term.

*James W. Monk*, attorney for plaintiff; *Daniel T. Walden*, of counsel.

*Thomas Darlington*, attorney for defendant; *Samuel Jones*, of counsel.

BY THE COURT.—CURTIS, J.—The admission in the answer of the making and endorsing by defendants of a note, "like that set forth" in the complaint, unaccompanied with anything tending to show that it was a distinct note from that described in the complaint, and on which the action is brought, must be held to refer to the note sued upon.

The answer does not put in issue plaintiff's claim to be the lawful holder of the note, but states facts showing that the plaintiff is the holder of the note, as collateral security for a loan.

The plaintiff is the holder of a negotiable promissory note endorsed by the payees. It is not alleged in the answer that he received it, with notice that it was delivered to Dobbs for any specific purpose, or of any equities between the parties, or as security for an antecedent debt. On the contrary, the answer states that the note was delivered to the plaintiff as security for money loaned by the plaintiff to Dobbs, the then holder of the note. The answer discloses facts showing that the plaintiff is a holder of the note for value, and does not question his good faith in becoming such holder. No burden is cast on the plaintiff to show that he is a *bona fide* holder.

In the Bank of New York v. Vanderhorst (32 N.

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Opinion of the Court, by CURTIS, J.

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Y. 553), affirming 1 *Robt.* 211, it is held, that taking a note as collateral security under such circumstances constitutes a holder for value. The principle, that when commercial paper is received as security for an advance made upon it at the time, without notice of any defects of title, the law merchant protects the transferee against all latent equities, whether of third persons or parties to the instrument, is recognized in *Weaver v. Barden* (49 *N. Y.* 294, 295), and in *Muller v. Pondir* (55 *N. Y.* 332).

The plaintiff thus holding the note as a pledge, the law confers on him the power to receive the whole money from the makers of the note, and to sue for its collection. The money when so received is simply held by him as a substitute for the note, and subject to all the terms and conditions affecting it (*Garlick v. James*, 12 *John.* 146).

In *Wheeler v. Newbould* (16 *N. Y.* 392), the decision of this court, that the pledgee of commercial paper, in the absence of any special powers, was bound to hold and collect it, and apply the money to the payment of the loan, and return the balance, if any, was affirmed.

The allegation of the answer, to the effect that there are other parties claiming title to the note, or to the proceeds, are of no force. The law affords the defendants a proper remedy for their protection in such a contingency, which they have not thought fit to resort to, and the proceeds of the note are to be reached through the plaintiff.

The exceptions should be overruled, and judgment ordered for the plaintiff upon the verdict, with costs.

MONELL, Ch. J., and SPEIR, J., concurred.

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Statement of the case.

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WILLIAM SANDER AND CHRISTOPHER C.  
EARL, PLAINTIFFS AND APPELLANTS, v. GEORGE  
M. HOFFMAN AND SOPHIA HOFFMAN, DE-  
FENDANTS AND RESPONDENTS.

RESTRICTION OF TRADE.

CONTRACT OF SALE OF BUSINESS, AND GOOD-WILL OF THE SAME, AND  
COVENANTS TO ABSTAIN FROM PROSECUTING LIKE BUSINESS WITHIN  
CERTAIN LIMITS.

The defendants sold the good-will of a provision business, at 228 Third avenue, to plaintiffs, and covenanted with them that they would not engage in a similar business, for five years, within certain limits. Within the stipulated time, defendants resumed and engaged in a like business at 805 Sixth avenue, beyond the limits prescribed. Some of their former customers residing within the prescribed limits sought them in their new place of business, and solicited them to supply them with meats, &c., and they did so, sending their agent or messenger every day to their houses, situate within the limited district, to receive orders and afterwards filling the orders given. The orders were not originally sought or procured by defendants, but proceeded from the customers.

The plaintiffs claimed this to be a breach of the covenant of defendants.

*Held*, by this court, that the acts of the defendants did not constitute a breach of said covenant.

Such contracts are upheld only when it appears that the public interest or convenience will not be prejudiced. The public comfort and welfare are the controlling considerations. A construction or decision that would make defendants liable under the circumstances in this case, would be harsh and unjust. It would be an unwise interference with the usual course of business and trade, and the requirements of public convenience and comfort, which should never be prejudiced by contracts imposing restraints upon traffic.

The following cases reviewed and approved: *Lawrence v. Kidder*, 10 *Barb.* 641; *Smith v. Smith*, 4 *Wend.* 408; *Turner v. Evans*, 2 *Ellis & Blackburn*, 512; *Lee v. Ehrhardt*, 19 *Law Times N. S.* 637

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Statement of the case.

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Before CURTIS and SPEIR, JJ.

*Decided May 3, 1875.*

Appeal from a judgment in favor of defendants, and from an order denying plaintiff's motion for a new trial upon the minutes.

This action is to recover five thousand dollars liquidated damages for breach of covenant.

The defendant George M. Hoffman by bill of sale, dated May 1, 1871, for three thousand five hundred dollars, sold to plaintiff the good-will of the butcher, and fish, and vegetable, and provision business, carried on by him at 228 Third Avenue, New York City, and also leases of the premises and utensils there. And both the defendants, in consideration thereof and for one dollar, by virtue of a separate instrument dated May 1, 1871, covenanted that they would not, either jointly or severally, as agent or principal, engage in or carry on any similar or competitive retail butcher, and fish, and provision business for five years in certain limits in said city, under five thousand dollars liquidated damages, and Mrs. Hoffman bound her own estate to pay that sum in case of her own default.

The plaintiffs then entered upon the premises and conducted the business. It was the purpose of the vendor to go to Germany. He went to Europe, and returned in the fall. In June, 1872, he opened business as a retail dealer in "butcher's meat, vegetables, and provisions," at a store No. 805 Sixth avenue, beyond the specified limits.

During the period limited by the agreement, the defendants, in a few instances, sold and delivered meat to three or four of his old customers, within the restricted limits. When the meat was sent, the carrier would bring back a new order which would be supplied. The defendants testified. that these persons ap-

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Statement of the Case.

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plied to them for meats, without any solicitation or procurement on their part. It appeared that the defendants when they sold out, had recommended their old customers to purchase from the plaintiffs, and that in two or three of the instances complained of, the customers had become dissatisfied with the plaintiff's meats, had resorted to other dealers, and ultimately applied to the defendants who then sold to them.

The defendants claimed that these supplies were furnished as a favor or personal accommodation to the applicants, and that it was in no sense an engaging in, or carrying on a similar or competitive business. The defendants' shop or place of business, where they kept their meats and attended to their occupation, was about half a mile outside of the prescribed limits. There was conflicting testimony, as to whether the defendants' went within those limits and solicited the trade and custom of persons who had previously dealt with them. The plaintiffs requested the court to direct a verdict in their favor. The court refused, and they excepted.

The court charged, that the defendants could not engage in a business similar to that which was previously carried on within the restricted limits; that is, that the defendants had no right to go within those limits, and then solicit and procure the custom and trade of persons who had previously dealt with them at their place there.

The court then instructed the jury that they were to pass upon the question of fact arising from the conflicting evidence as to whether there was such solicitation or procurement on the part of the defendants. That if they found that the defendants at any time after the sale to the plaintiffs went by themselves or their agents into the prescribed limits, and there solicited or procured orders for meat, &c., to be sent from their establishment or store in the Sixth avenue,

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Statement of the Case.

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between Forty-fifth and Forty-sixth streets, and that the defendants received and filled such orders and sent in pursuance of them their meats to the persons from whom they had thus procured such orders, it was within the meaning of the contract a competitive business, and a breach of the defendants' covenant.

But if they found that they did not go into the prescribed limits and procure such orders, but that the persons within such limits voluntarily and without solicitation of defendants gave them orders (and whether they gave their orders within such limits or otherwise was immaterial), the filling of such orders was not a breach of the covenant.

That to be a breach of the covenant, it must appear that the defendants solicited the custom of persons residing within the prescribed limits; not that such persons came to the defendants or saw them, or either of them, within the limits, and gave them orders. If it was voluntary on the part of the customers, and not the result of solicitation on the part of the defendants, then, although the defendants filled their orders, it was no breach of their covenant.

That if they found there was such a solicitation on the part of the defendants, then their verdict must be for the plaintiffs, and that the only amount they were authorized to give was the full amount of the liquidated damages agreed upon between the parties, namely, five thousand dollars.

The plaintiffs excepted to that part of the charge in which the court instructed the jury, that the defendants had a right to fill orders within the prescribed limits, if customers came to them voluntarily.

The jury asked this question of the court: "Is the sending of an agent every day to the houses in the limited district to take orders, and filling them, a competitive business, or soliciting the same?" The answer of the court was, "In the construction I have given to the

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Opinion of the Court, by CURTIS, J.

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contract, it would not be. The orders must have originally been procured by the solicitation of the defendants. If they proceeded from the customers, and not by the procurement of the defendants, it was not a breach to fill them. To this, the plaintiffs excepted. The jury found for the defendants.

*Charles H. Smith, Jr.*, for appellants.

*A. F. & W. H. Kircheis*, attorneys for respondents ; *John L. Hill*, of counsel.

BY THE COURT.—CURTIS, J.—From wise considerations of public policy, contracts imposing a restraint upon trade throughout an entire state or county are held void, but this rule is sometimes relaxed as to small districts or towns, when it appears that the public interest or convenience will not be prejudiced. The public comfort and welfare are the controlling considerations (*Lawrence v. Kidder*, 10 Barb. 641). In the present case no question arises as to the validity of the restraint.

In *Smith v. Smith* (4 Wend. 468), where a physician bound himself in a penal sum for ten years, not to reside or practice within six miles of a certain village, and had removed seven miles therefrom, and it was shown that he practiced for two months in and around the village during the period, and claimed the right to do so at any time, it was held a breach of the bond. The mere removal of his residence beyond the restricted limits, does not appear to have been considered a compliance with the covenant, but it was construed to extend to a prohibition of a resumption of practice therein. The question was not before the court as to whether, if in three or four instances, old patients had sought his attendance, and he, as a matter of kindness or personal consideration for them, had attended them, that would constitute a breach of the bond.

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This question is what we now have before us. There is no dispute but that, in a few instances, the defendants supplied meat to old customers, within the limits ; and the jury, in effect, find that this was not done at the solicitation or procurement of the defendants. The defendants' place of business was outside of the restricted limits. Can we establish the rule, that the obligor in this common species of obligation, who in a large town removes his place of business, in conformity to it, is to be held to have violated it, if subsequently by chance in the current of business at his shop, or as a matter of favor or accommodation, and with no procurement or seeking on his part, he supplies some articles to three or four of his old customers in the forbidden territory ? This would be a harsh construction, and one which the courts have avoided giving to this covenant. It would be an unwise interference with the usual course of business, and the requirements of public convenience and comfort, which latter can never be prejudiced or made secondary by contracts imposing restraints upon traffic.

In the case of *Turner v. Evans* (2 *Ellis & Blackburn*, 512), where the vendor of the business of a wine merchant covenanted, "that he would not set up, embark in, or carry on the business in certain limits," and removed his place of business outside of the limits; it was held, that the systematic soliciting and supplying orders within the limits in fifty instances, was a breach of the covenant. Says, LORD CAMPBELL, C. J. : "If done now and then, to oblige an old customer, or the like, it would be no breach of the contract, for that would not be carrying on business ; but it was done on system." EARL, J., concurred. COMPTON, J. : "I think the question was one of fact. Was he doing this on system ? For he would not be carrying on business, if he did it only now and then."

The view of the court of Queen's Bench seems to



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confine the question, as to whether the soliciting orders and supplying was done as a system, and to hold that where it was done, as appears in the present case, now and then to oblige an old customer, it was no breach.

When the question between these parties was before the court of chancery (2 *De Gex, M. & G.* 740), the application for an injunction was denied, the court appearing to consider the removal of the place of business as the substantial requirement of the contract, and to be reluctant, from regard to the public interest, to enforce a restraint upon the general freedom of soliciting orders, or to sustain any interference in conveying of intelligence to the public of opportunities and requests to make purchases in the ordinary course of trade.

In *Lee v. Ehrhardt* (19 *Law Times N. S.* 637), it was held, that occasional assistance of the vendor rendered by him to his daughter, was not a breach of the covenant "not to take, keep, or be concerned in" any public house within the prescribed distance of the one sold.

BLACKBURN, J., charged the jury that the question was one whether defendant acted in good faith as a matter of kindness; but if they were of opinion that his conduct was in the nature of a juggle, to find for the plaintiff. The defendant had a verdict. On a review of the question, COOKBURN, CH. J., considered that the covenant must be taken to mean, that he shall not be concerned in any public house, so as to be interested in it; that is, have any share in its profits, or any interest in it that could prejudice the other party to the covenant. BLACKBURN, J., concurred.

MELLOR, J., stated the interest must be such as would induce the person having it, to support one public house, and to prejudice the other. Casual assistance in carrying on business is not a breach. To hold so would be a very harsh construction. HAYS, J., concurred.

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Applying the construction given to the covenant in the last two decisions to the one under consideration, which is substantially the same, it will appear that the plaintiff failed at the trial to establish the breach of the covenant complained of, and that the defendant's exceptions can not be sustained.

There are substantial reasons why such construction should be given. It is reasonable, and in conformity to the interest of the parties, and to what is due in this class of obligations to the public welfare.

The judgment appealed from, and the order denying the motion for a new trial should be affirmed, with costs.

SPEIR, J., concurred.

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FRANCIS O. WIREMAN, PLAINTIFF AND APPELLANT, v. REMINGTON SEWING MACHINE COMPANY, DEFENDANT AND RESPONDENT.

OFFER OF JUDGMENT—PRACTICE THEREIN.

Defendants on the 4th of November, 1874, offered to allow judgment to be taken against them for seven hundred and fifty dollars, with interest and costs, which offer was not accepted, and defendant afterwards answered, contesting plaintiff's claim for all sums beyond the said seven hundred and fifty dollars.

Plaintiff moves for an order that the defendant pay to him the amount of said offer.

*Held*—That since the amendment of § 244 of the code (in 1857), such an application has been and should be granted.

This is a substantial right when the answer "*admits part of the plaintiff's claim to be just,*" and in conformity to § 244 of the code;

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it being in the nature of a right to a judgment, and, therefore, no question arises as to whether a party can appeal from an order affecting it.

BEFORE CURTIS and SPEIR, JJ.

*Decided May 3, 1875.*

Appeal from an order of special term.

The plaintiff, in his complaint, alleges that he made, furnished, and delivered to the defendants certain sewing-machine covers, drawers, tables, &c., for which the defendants agreed to pay him one thousand two hundred and fifty dollars.

The answer admits the making and furnishing of the same articles, but sets up that they agreed to pay plaintiff therefor seven hundred and fifty dollars, and no more, and that they have always been ready and willing, and have repeatedly offered to pay the plaintiff said sum of seven hundred and fifty dollars, but the plaintiff has refused to accept the same.

The defendants have also offered to allow plaintiff to take judgment for said sum of seven hundred and fifty dollars, with interest and costs, but the plaintiff did not accept the same.

The plaintiff in his complaint also alleges that he did certain other work, and furnished certain other material for the defendants, of the value of forty-one dollars and ten cents, which the defendants deny.

A motion under section 244 of the code was made by the plaintiff at special term, that the defendants pay said sum of seven hundred and fifty dollars to him with interest, &c., which motion was denied, and the plaintiff appealed.

*Jno. J. Lindsay*, for appellant.

*Wm. G. Bussey*, for respondent.

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BY THE COURT.—CURTIS, J.—In the case of *Smith v. Olssen* (4 *San.* 711), decided in 1852, it was held that the court would not make an order like that applied for here, where the defendant before answering served the plaintiff with a written offer, allowing the latter to take judgment for the part of the claim so admitted. But the reason which the court assigned for this refusal was obviated by the amendment of section 244 of the code in 1857, and since then it has been the practice to grant the application, although an offer has been made and rejected. When the justice of a part of the plaintiff's claims is admitted, both by the answer and by an offer to submit to a judgment, an additional reason exists for extending the remedy granted by the legislature. A refusal is in substance saying to the plaintiff, you shall have nothing of what the defendant admits belongs to you until the end of the litigation (*Duncan v. Ainslie*, 26 *Barb.* 201; *Roosevelt v. N. Y. & H. R. R. Co.*, 45 *Barb.* 554; *Guier v. Murphy*, 18 *How. Pr.* 411).

In the present cause there is no splitting up of the cause of action, as the admission in the answer relates only to the making of the sewing machines, for which one thousand two hundred and fifty dollars is claimed as due by the plaintiff, and for which the defendant admits seven hundred and fifty dollars to be due. There appears to be no just reason why this amount of seven hundred and fifty dollars should be withheld from the plaintiff, which the defendant concedes is due to him, and about which there is no manner of controversy, and the payment of which to the plaintiff can in no way prejudice the right of either party in proceeding by legal steps to determine the real matters in controversy between them. To hold otherwise would defeat the right of a party to the relief afforded by this wise and equitable provision of the law.

This right is a substantial right, when the admis-

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sion in the answer "admits part of the plaintiff's claim to be just" in conformity to section 244 of the code, it being in the nature of a right to a judgment, and no question arises as to whether a party can appeal from an order affecting it.

The order appealed from should be reversed with costs of appeal to the appellant, to abide the event of the suit.

SPEIR, J., concurred.

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EDWARD M. WORDEN, PLAINTIFF, v. THE  
GUARDIAN MUTUAL LIFE INSURANCE  
COMPANY OF NEW YORK, DEFENDANT.

The policy of insurance in this case, designated the first days of March and September as the time for the payment of the semi-annual premiums, and then proceeds to declare that the premiums shall be paid on or before the days upon which they become due, *or within thirty-five days thereafter*. It then provided that in case of a violation of any of its provisions, it should *become null and void*. It also contained a provision, that from the amount paid in case of death, there should be deducted the balance of the year's premium, and all indebtedness of the assured.

It also contained a provision for the issue to the assured of a paid-up policy, for a pro rata amount of the whole amount insured, in case the assured discontinued payments of premiums after the payment of the first annual premium. The policy also had printed prominently on its face the words, "Non-forfeiting life policy."

The assured paid two semi-annual premiums on this policy that became due, to and including the 1st day of September, 1873.

The premium due on the 1st of March, 1874, was not paid on that day, but was paid on or about the 24th day of March, 1874, by the plaintiff, brother of the assured, under the following circumstances.

## Statement of the Case.

On the 21st or 22nd day of March, 1874, the brother of the assured received a letter from him (then residing in Virginia) requesting him to send to the company the amount of the semi-annual premium due on the 1st of March, 1874, *before the expiration of the thirty-five days from the 1st of March, 1874*. Before the premium was paid in pursuance of said letter, and after the said brother had received a telegram announcing the death of the assured, and on the 24th day of March, 1874, the said brother in pursuance of the request in said letter, sent by mail to the company, the semi-annual premium due March 1, 1874, but without notifying the company of the death of the assured, and the company gave a receipt for the same without knowledge or information of the death of the assured; but afterwards and on the 31st of March, 1874, the company wrote to the said brother that "the death having occurred while the premium was unpaid, the policy is not binding on the company, and the premium remitted on the 24th is held subject to *your order*, or of the legal representatives of George P. Worden" (the deceased and assured).

The court held in this case, that an omission to pay the premium on this policy at the day provided therein, violated no condition of the policy, until *thirty-five days thereafter had elapsed*.

The insurance was in full force and effect for six months and thirty-five days after the 1st of September, 1873, without the payment of any further or additional premiums than had been paid, and the assured was protected during that time, and the defendant would have been liable on the policy if the premiums had not been paid at all (the assured died before the expiration of this time).

That the payment was made in accordance with the instructions of the assured, during his life-time, and there was no bad faith on the party acting for the assured, in complying with his request, and no undue delay in the payment in view of the time in which he had to comply with the terms of the policy.

The right to pay in this case was not personal to the assured, and could be delegated by him to, and paid by another. On this last point (*Want v. Blunt*, 12 *East*. 183; *Howell v. The Knickerbocker Life Ins. Co.*, 44 *N. Y.* 281; and *Tarleton v. Stanforth*, reviewed and considered).

Judgment rendered against the company defendant for the amount of insurance provided in the policy.

Before MONELL, Ch. J., and CURTIS and SPEIR, JJ.

*Decided May 3, 1875.*

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Statement of the Case.

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The controversy is presented in a case agreed upon, and submitted without action, pursuant to § 372 of the code, and which is as follows :

Edward M. Worden claims to recover of the Guardian Mutual Life Insurance Company of New York the sum of two thousand dollars and interest thereon from the 2d day of August, 1874.

The following are the facts upon which the said controversy depends :

I. That on the 17th day of October, 1872, the said company, which then was, and still is, a corporation duly organized under the laws of the State of New York, for the purpose of carrying on the business of life insurance, and has a place of business in the city of New York, issued to one George P. Worden a policy of insurance on his life, of which the following is a copy :

“THE GUARDIAN.

“No. 33,435

Age 25.

“MUTUAL LIFE INSURANCE COMPANY,

“Amount, \$2,000.

of New York.

“Non-forfeiting Life Policy.

“This policy of insurance, witnesseth that the Guardian Mutual Life Insurance Company of the City of New York, in the State of New York, in consideration of the surrender of policy No. 1711 in the New York State Life Insurance Company of Syracuse, N. Y., and of the representations and agreements made in the application of George P. Worden for said policy of insurance on the life of himself, and of the sum of thirty dollars and twenty-four cents paid said first mentioned company, and of the *semi-annual payment of a like amount on or before* the first days of March and September *in every year for the term* of five years, or during the continuance of this policy, at the office of said first mentioned company in the city of New York, or to their agents *as hereinafter provided*,

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do insure the life of George P. Worden, of Fulton, in the county of Oswego, and State of New York, in the sum of two thousand dollars, *for the term of his natural life.*

"And the said company do hereby promise and agree to pay the amount of the said insurance at their office, in the city of New York, in lawful money of the United States, to the assured under this policy, his executors, administrators or assigns, in sixty days after due notice and proof of death of the said person whose life is hereby insured, the balance of the year's premium, if any, also the amount due on all notes given for premiums hereon, and all indebtedness of the insured to said company, or said New York State Life Insurance Company, being first deducted therefrom.

"And it is agreed by said company that in case the assured shall elect, after the payment of the first annual premium stipulated to be paid hereon, to discontinue further payments, then said company will issue a paid-up policy for a pro rata amount of the whole sum insured upon a surrender of this policy while in force, to wit: two hundred dollars, for each and every annual premium paid hereon during the life of the person hereby insured to this company, and to the New York State Life Insurance Company upon said policy No. 1711, for which this is substituted.

"This policy is issued, and is accepted by the insured, and by the holder hereof on the following express

"CONDITIONS AND AGREEMENTS.

"First. That these statements, declarations and answers made in the application for policy No. 1711. issued by the New York State Life Insurance Company, and in the faith of which it is issued, which application is made a part of this contract, are warranted to be in all respects true, and without the suppression or concealment of any facts directly or indirectly relating to the health of the insured.



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"Second. That the premiums shall be paid on or before the days upon which they become due, or within thirty-five days thereafter, at the office of said company in the city of New York, or to their duly authorized agents, only when they produce receipts signed by the president or secretary.

"Third. That the said insured shall not, without the consent of said company previously obtained in writing, personally engage in the production of highly inflammable or explosive substances, or in the manufacture of gunpowder or fireworks, or as engineer, fireman or brakeman upon any railroad, or as engineer or fireman upon any steamboat, or enter into any active military or naval service, whatever.

"Fourth. That agents of the company can not alter or waive any of the conditions of this policy, nor change the time for the payment of premiums or notes, nor grant permits.

"Fifth. That if this policy shall be assigned or held as security, written notice shall be given to said company, and due proof of interest submitted with the proofs of death.

"Sixth. That in case of the violation of any of the foregoing conditions, or of *any of the conditions or agreements contained in the application* aforesaid, or of the assured dying by his or her own hand, or by delirium tremens, or in consequence of a duel, or in violation of the laws of the United States, or of any Nation, State or Province, or in case the insured shall be convicted of a felony, this policy shall become null and void.

"Seventh. That should this policy become null and void by reason of the violation of any of the said conditions or agreements, all payments made thereon shall be forfeited to said company.

"In witness whereof the said Guardian Mutual Life Insurance Company have, by their president and

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secretary, signed and executed this contract, this seventeenth day of October, one thousand eight hundred and seventy-two, but the same shall not be binding until countersigned by Adin W. Davis, agent at Syracuse, N. Y.

“LUCIUS McADAM,  
“Secretary.

AND. W. GILL,  
President.

“Countersigned at Syracuse this 24th day of October, 1872.

“A. W. DAVIS. Agent.

“NOTE.—All endorsements on this policy, to be valid, must be signed by the president or secretary.

“SPECIAL NOTICE TO POLICY HOLDERS.

“*Payments of Premiums.*—Premiums may be paid to an agent, but only on the production of a receipt signed by the president or secretary, who are alone authorized to sign receipts on the part of the company. When receipts are delivered to a policy holder by an agent, such agent should countersign the same as an evidence of payment to him.

“Agents are not authorized to receive any premium on the part of the company, unless they shall have been furnished with a receipt therefor, signed by the president or secretary, as no payment made to an agent without such receipt being given in return by him, is considered valid by the company.

“Should any policy holder tender payment of a premium to an agent, for which no receipt has been furnished, the following conditional receipt may be given by the agent, and no other:

“CONDITIONAL RECEIPT.

“Received        187 from        \$        stated to be the amount of a premium due this day on Policy No. issued by the Guardian Mutual Life Insurance Company upon the life of        for the sum of \$        and in the favor of        Said alleged premium is to be held by the undersigned until application can be made

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to the company to accept the same, and forward their receipt. If such receipt be forwarded, this conditional receipt is to be exchanged therefor; if the company's receipt be not forwarded, the money is to be returned and this conditional receipt cancelled.

“(Signed)

J. D., Agent.

“*Powers of Agents.*—Agents are not authorized to make, alter or discharge contracts, waive forfeitures, name an extra rate for special risks, or bind the company in any way; their duties being simply the reception and transmission of applications for policies and premiums, under the rules and instructions laid down in their letters of appointment.

“Agents of the company are not, under any circumstances, authorized to write the receipt of premiums, or make any indorsement whatever on the policy.

“*Restoration of Forfeited Policies.*—The company may, but solely as an act of grace or courtesy, and when the interest of the company will not be impaired in any way thereby, restore a forfeited policy. When a restoration is applied for, the application must invariably be accompanied by a certificate as to the health of the person whose life was insured, and at his expense, from a physician acceptable to the company. The agent forwarding such application will then be notified of the decision made in the case.

“In all cases of restorations of forfeited policies, and in all cases where the premium is received after the day on which it becomes due, although the policy may not have been formally cancelled on the company's books, the renewal or the revival of the policy, in whatever form made, will be in accordance with the decision of the commissioners of internal revenue, subject to stamp tax, the same as if a new policy had been issued.

“*Alteration of Policies.*—Changes in the manner of

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paying premiums (as from yearly to half yearly or quarterly, or the reverse) can only be made at the *end of a year*, dating from the commencement of the policy; and when such a change is desired by a policy holder, the policy must be forwarded to the office of the company for the requisite indorsement.

“A change of interest in a policy, can only be made on the written request of the legal owner of the policy, and with the consent of the company.

“*Assignments*.—A wife can not legally assign a policy drawn in her favor.

“When a policy is issued to a person on his own life, and afterward assigned by him for a ‘valuable consideration,’ written notice of such assignment must be given to the company for registration on its books.

“All assignments, to be valid, require a revenue stamp, equal in value to that on the policy, and the cost of such stamp must be borne by the policy holder.”

II. That thereafter the plaintiff, at the request and for the benefit of the insured, paid the semi-annual premiums thereon as follows:

The semi-annual premium due thereon on the first day of March, 1873, and payable as therein provided, was paid and accepted on the third day of April, 1873, and the semi-annual premium due thereon on the first day of September, 1873, and payable as therein provided, was paid and accepted on the 25th day of September, 1873; that the semi-annual premium due on the first day of March, 1874, and payable as therein provided, was not paid on said first day of March, 1874, but that on the 21st or 22d day of March, 1874, the plaintiff, who resides at Fulton, New York, received a letter from the insured, his brother, who was then at Saltville, Virginia, requesting him to send the company the amount of the semi-annual premium due on the first of March, 1874, and payable as in said policy pro-

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vided, before the expiration of the thirty-five days from the first of March, 1874.

III. That on the 24th day of March, 1874, said plaintiff received a telegram, informing him of the death of the insured.

And that on the same day, being the day on which the assured died, but after his death, and after the reception by said plaintiff of the said telegram announcing the death of the insured, the said plaintiff, pursuant to the previous request, sent by mail to the company the amount of the semi-annual premium due on March 1st, 1874, and payable as therein provided, without notifying or informing the company of the death of the insured, and that thereupon the company gave a receipt for the same, without knowledge or information of the death of the insured, or anything to put them on inquiry.

That on March 31st, 1874, and after the payment of the premium as above stated, the company wrote the plaintiff, that "the death having occurred while the premium was unpaid, the policy is not binding on the company, and the premium remitted on the 24th is held subject to your order or of the legal representatives of Geo. P. Worden."

IV. That the insured died intestate at Saltville, Virginia, March 24th, 1874, from causes other than those excepted by the terms of the policy.

V. That on April 28th, 1874, W. A. Stuart was "at a circuit court held in and for Smyth county, Virginia," duly appointed administrator of the goods and chattels of the said George P. Worden, deceased, and duly qualified as such.

That on June 2, 1874, due notice and proof of the death of said insured was given to said company.

VI. That on November 16th, 1874, W. A. Stuart, as administrator aforesaid, for value duly assigned and transferred to plaintiff, of Fulton, New York, said

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Opinion of the Court, by CURTIS, J.

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policy of insurance, together with all causes of action thereunder, and that said Edward M. Worden now owns and holds the same.

VII. That the company has not paid the sum of two thousand dollars, agreed to be paid by the terms of said company's policy, and that they refuse to pay the same or any part thereof.

The question submitted to the court upon the case is as follows :

Is the company under this policy liable for the amount of the insurance ?

If this question is answered in the affirmative, the judgment is to be rendered in favor of the plaintiff, and against said company, for the sum of two thousand dollars (\$2,000), and interest from August 20th, 1874, with his costs.

If answered in the negative, judgment is to be rendered in favor of said company for their costs.

None of these admissions herein contained are in any wise to affect either party, or to be regarded as made except for the purpose of this submission of this controversy.

*Childs & Hull*, attorneys for plaintiff, and *Daniel B. Childs*, of counsel.

*Miller, Peet & Opdyke*, attorneys for defendant, and *Livingston K. Miller*, of counsel.

BY THE COURT.—CURTIS, J.—It will be observed that the policy in question differs in its phraseology and provisions from those that have usually been before the courts for consideration. It insures the deceased in the sum of two thousand dollars, for the term of his natural life, in consideration of the surrender of a pre-existing policy, and of the semi-annual payments of thirty dollars and twenty-four cents for the term of five years. It

also contains a provision for the issuing to the assured of a paid-up policy for a pro rata amount of the whole sum insured, in case he discontinues payments after the payment of the first annual premium.

The principal question presented by the case, agreed upon and submitted by the parties, is whether the policy was in force on the day when the assured died. The policy designates the first days of March and September as the time when the payments of premiums are to be made. It then proceeds to declare that the policy is issued, and is accepted by the assured upon the express condition and agreement "that the premiums shall be paid on or before the days upon which they become due, or within thirty-five days thereafter." The policy then provides that in case of a violation of any of its conditions it shall become null and void. The policy also contains a provision that from the amount to be paid in case of the death of the assured, there shall be first deducted the balance of the year's premium and all indebtedness of the assured.

These provisions and clauses of the policy have to be considered and construed together to ascertain and give effect to the real intentions of the parties. There is no provision that the policy shall become void, if the payment of the semi annual premiums is not made on the first days of March and September, but it is provided that it shall become void if the premium is not paid within thirty-five days thereafter. An omission to pay the premium violates no condition of the policy until the thirty-five days have elapsed. There could be no forfeiture of the rights of the assured except in accordance with the terms of the policy. The defendants saw fit to issue a policy by the terms of which the insurance was in effect for six months and thirty-five days after September 1st, 1873, and containing no clause or intimation that the policy was to be annulled or made void by an omission to pay the premium before

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Opinion of the Court, by CURTIS, J.

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the expiration of that time. Under such circumstances it is but reasonable to suppose that the assured was to be protected during the thirty-five days. He had reason to consider that to be the true meaning and intent of this policy, and if the defendants desired a different construction, they should have inserted in their policy the provision that a failure to pay on the first day of September or of March forfeited the policy.

Forfeitures are only enforced when it is clearly shown that they were meant by the actual agreement of the parties. Nothing in the present case shows that the parties agreed that there was to be any forfeiture before the expiration of the thirty-five days. If a life insurance company, with a view of attracting the public and promoting its own business, chooses to extend the period for the payment of semi-annual premiums through a period of thirty-five days, and to employ language tending to indicate that the risk is extended through the same period, or which might bear that construction, it is not just that its reasonable intendment should be defeated by an interpretation in favor of the insurers. When still further the insurers, as in the present instance, place prominently upon the face of the policy at its head the words "non-forfeiting life policy," it is difficult for the courts to enforce harsh forfeitures, into which the unwary may have been innocently lured.

*Verba ambigua fortius accipiuntur contra proferentum* (Jackson v. Topping, 1 Wend. 394; Linden v. Hepburn, 3 Sand. 670; Baxter v. Lansing, 7 Paige, 353; Marvin v. Stone, 2 Cow. 781).

In this aspect of the case, the defendants would have been liable if the premium payable within thirty-five days from March 1st. 1874, had not been paid. It was, however, paid to the defendants on the twenty-fourth day of March following, by the brother of the deceased, under written instructions from the deceased conveyed to him from Virginia two or three days pre-



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Opinion of the Court, by CURTIS, J.

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vious. The brother paid it on the twenty-fourth of March, the same day after he received by telegraph the intelligence of the decease of the assured.

The case as submitted shows no undue delay on the part of the person who made the payment, in view of the time in which he had to comply with the terms of the policy.

It is claimed on the part of the defendants that this payment under the circumstances was unfair, and that the right to make it was personal to the assured, and could not be delegated, and that it ceased with his death.

The payment was by the instruction of the deceased, and reached the insurers after his death, as it might have done if the deceased had forwarded it by post or by a public carrier. There was no bad faith in complying with his request.

There is not much force in the claim that the right to make the payment was personal, and could not be delegated, and closed with his death. The language of the policy imposes no restriction as to who may make the payment, and is entitled to the same construction in favor of the assured as has been applied to the thirty-five days clause, and comes within the same principle. In the case of *Want v. Blunt* (12 *East*, 183) Lord Ellenborough based his ruling that the right to pay was personal to the assured on the provision of the policy that the party whose life is insured should *himself pay during his life*. But the present policy can not be affected by decisions which, though apparently adverse to the plaintiff, will upon a careful examination be found to turn upon different language and restrictions. In *Howell v. The Knickerbocker Life Ins. Co.* (44 *N. Y.*, 281) it is said in reference to a policy providing "*that the assured shall duly pay*" the premium, that such act could have been performed by any other person as well, and that "its payment did

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not necessarily depend upon his continued capacity or existence."

The case of *Tarleton v. Stanforth* (5 *T. R.*, 695) cited by the defendants on the argument, as well as various other cases, and some of them seemingly favoring the defendants' position, will be found on examination to turn upon admissions or policies differing from the one before us.

In view of the form of the policy, and the construction put upon that class of instruments by our courts, the language of which is that of the insurers, I think the defendants are liable for the amount of the insurance, and the plaintiff is entitled to a judgment therefor, with his costs.

MONELL, Ch. J., and SPEIR, J., concurred.

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DUNCAN McCOLL, ET AL., PLAINTIFFS AND RESPONDENTS, v. THE SUN MUTUAL INSURANCE COMPANY, DEFENDANT AND APPELLANT.

MARINE INSURANCE—POLICY, CONDITIONS OF—TOTAL LOSS.

The facts in this case show the vessel upon a reef at Cow Bay on the coast of Cape Breton, a dangerous coast, at a season when there was the greatest probability of gales and destructive seas, and the vessel on the rocks under a high and precipitous cliff, and confirm the oral testimony that she could not have been taken off, *and was a total loss*, subject only to a chance that she might survive the winter tempests and waves. This mere chance (which was sold at public auction) did not forbid the conclusion that *under this policy* the loss was total.

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If the facts had been submitted to the jury, a finding contrary to this conclusion of the court would have been against a decided preponderance of the testimony.

**DEVIATION.**

The bark "*Lindo*," was insured for the voyage, "*at and from Miramichi, to a port in Cape Breton, and at and thence to New York.*"

The vessel sailed from Miramichi November 24th, 1864, bound for Big Glace Bay, a port in Cape Breton, having cleared at the Custom House in Newcastle (within which district Miramichi lies) for the port of Big Glace Bay, under a certificate from the collector to that effect, consigned to the agent of the Clyde Mines, at Big Glace Bay, to load coal at that port for New York under a written charter dated November 18th, 1864, by which the owner agreed with Halls & Creed, agents of the mines, that the said vessel should receive on board a full cargo of coal in bulk, which the charterers agree to furnish "at Clyde Mines, Big Glace Bay, C. B.," and being so laden, to sail to New York, for three dollars and seventy-five cents, gold, per ton. By the charter it was also stipulated that "if on the arrival at Big Glace Bay, the captain does not consider it safe to remain and load, then he is to be at liberty to proceed elsewhere, and this charter to be considered cancelled." On the evening of November 25th, the vessel having passed the North Cape of Cape Breton, and at ten o'clock P. M. Sydney light, then bearing west about three miles, the captain concluded to put into Sydney, a port in Cape Breton, and lying off and on till morning entered that port and anchored there November 26th. There was no storm or stress of weather which required him to put into Sydney. There the vessel remained sixteen days, until December 12th, when she sailed for Cow Bay, a third port in Cape Breton, and while loading there with coal for New York, a sudden storm drove her upon the rocks, constituting the alleged loss.

*Held*, That the act of the master taking the vessel from Sydney, to Cow Bay (a second port of Cape Breton) was a *deviation* from the voyage for which she was insured.

The master had a right to select a port of Cape Breton, but his right and the rights of the bark were exhausted by the use of one port. He could not enter one for the purpose of selecting another, or afterwards proceed to another port from the one first entered.

If the use of the first port was a part of the voyage, then the

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act of seeking and taking another was a deviation. If the first port was not a part of the voyage, then the act of seeking it was a deviation in itself. By the policy, it was also warranted, that the vessel was commanded by a captain holding a certificate from The American Shipmasters' Association. The bark was not so commanded, but this fact was made known to the insurers by the insured, and the policy made and delivered, and the premium paid upon the condition that this vessel was a foreign vessel, and it should not or would not apply.

*Held*, that the insurers dispensed with such a certificate, and waived the same.

Before SEDGWICK and SPEIR, JJ.

*Decided May 3, 1875.*

Appeal from judgment for plaintiff on verdict directed by the court.

The action was upon a policy of marine insurance which insured the bark "Lindo," "at and from Miramichi to a port in Cape Breton, at and thence to New York, with privilege of carrying coal exceeding her tonnage."

The bark sailed from Miramichi, on November 23, 1864, for Cape Breton. There were several ports in Cape Breton, viz.: Cow Bay, Little and Big Glace Bays, Schooner Pond, Bridgeport, and Lingan, which were upon open roadsteads. Vessels loaded with coal at these ports; but during the winter months, it was dangerous to vessels to lie there, while waiting to load. Strong evidence was given to show that, at such time, it was the custom of trade and navigation that vessels proceeded to the port North Sydney, where the harbor was safe, and waited until they could be immediately loaded at the unsafe ports with coal, and then went, were loaded and departed on the voyage.

The "Lindo" was chartered at Miramichi, to take a cargo of coal at Big Glace Bay. The charter party had the provision, that "if on arrival at Big Glace Bay, the captain does not consider it safe to remain and load

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then, he is at liberty to proceed elsewhere, and this charter to be considered cancelled." The captain was not, on the voyage, acquainted with the terms of the policy. The bark arrived off the North Cape of Breton, on November 25th about noon. It then began to snow in thick squalls. This continued until six o'clock in the afternoon. About eight o'clock in the afternoon Sydney Light was made. At about ten o'clock in the afternoon the captain tacked ship and lay off and on until morning, and at about five o'clock in the afternoon of November 26th, dropped anchor in the harbor of Sydney. In his protest he stated that he went into Sydney "for the purpose of making a harbor, there being no safe anchorage either at Big Glace Bay or Cow Bay." In his testimony he said that he went to Sydney for a harbor, that he did not know what kind of a place Big Glace Bay was, and did not like to go there with the vessel. In answer to a question by plaintiff, "Did you go into Sydney for the purpose of obtaining a cargo of coal, or did you go into it as a port of safety?" he said: "I went into it as a port of safety, but did not go in for the purpose of obtaining a cargo of coal."

The captain went to Big Glace Bay to find if it were prudent to take in coal there, but deemed it best to cancel the charter party, and then entered into a charter-party to take a cargo at Cow Bay. This was done promptly, but the bark waited at Sydney for her turn at Cow Bay until December 12th. She reached the wharf at Cow Bay on the 18th. On the evening of the 19th, a most violent gale arose and tore the bark from her fastenings. Her bitts were pulled out and part of her deck ripped up, and she was driven upon a reef of rocks, beating and thumping heavily. The main-mast, fore-mast, and mizzen top-mast went by the board with all the gear attached. She was driven to the foot of a perpendicular cliff, from sixty to one hundred feet

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in height. She received many other serious injuries. It was impossible, under the circumstances, to get her off the rocks, at that time, on account of her situation and the stormy character of the climate at that season. Some of the spars, sails, rigging, blocks, and stores, were removed from the bark to the shore, and they and the hull were sold by the captain at public sale for the aggregate gross sum of one thousand and seven dollars. The captain had to pay for stripping the vessel, two hundred dollars. In August of 1865, and after she had been still further injured, she was raised and taken to Sydney, where she was repaired at the expense of about ten thousand dollars in gold. The cost of raising her and towing her to Sydney was more than two thousand dollars in gold. She was not repaired until 1866.

The policy contained a warranty by the assured, that the vessel be commanded by a captain holding a certificate from the American Ship Masters' Association. The bark was a British vessel, and the master of it a British subject. The president of the company, when the plaintiff's broker informed him before the taking out of the policy of the facts in this regard, said to him, that this provision was not applicable. There was no proof that the master had the certificate.

On the evidence the defendants moved for a non-suit, but the court directed a verdict for the plaintiff, to which exception was taken.

*Joseph H. Choate*, for appellants.

*Albert Matthews*, for respondents.

BY THE COURT.—SEDGWICK, J.—We must consider with the learned judge who directed the verdict, that at the time the bark was upon the reef at Cow Bay, she was totally lost under the policy. The character of the coast, the season, when there was the

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greatest probability of gales, and a destructive sea, the situation of the bark on the rocks under the cliff, confirm the oral testimony, that she could not then have been taken off. At the best, there was a possibility that in the next season, she might be raised and removed. But in the meantime, how far she would be broken up by the storms and waves, was not certain. It was certain that, as the fact turned out, she must suffer more and more loss from time to time. It was not improbable that in the next spring, she could not be known as a vessel. The captain had no means of determining the event. It then being certain that before the vessel could be repaired, there must be a delay until spring to know whether or not she could then be moved, and it being just as likely, as not likely, that in the spring the only improvement in the circumstances would be that the weather and the sea would allow work to be done, but that then the vessel would have been broken up by the tempests and waves of the winter, there was at the time the bark went on shore, a loss, total to human calculation and observations, subject to a chance, that there might be in the future enough left of her to permit her being moved. This mere chance, which was sold at public auction, was not a well-founded hope, that she could be repaired in the spring, and does not forbid the conclusion that under this policy the loss was total. If the question had been sent to the jury, and they had found that the captain was bound in November to have a reasonable hope that the bark would retain its character as a vessel through the winter, and until the calmer weather of the next year, it would have been against what seems to me to be the decided preponderance of the testimony on this point.\*

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\* This case was before the court, and a new trial ordered, because of a failure to prove total loss. See 34 *Sup'r Ct. Rep.* 310.

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Opinion of the Court, by SEDGWICK, J.

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I, however, am of the opinion, that the master taking the bark from Sydney to Cow Bay was a deviation. She was insured to and at a port in Cape Breton. The owner or master had a right to select the port. The rights of the bark would be exhausted by use of one port. Even if it be granted that whatever (even another) port was by custom incidental to use of the selected port might itself be used, it is manifest that there was no right to enter one port, for the purpose of selecting another port as the one at which the policy provided the insurers were to be liable, and to proceed to the other port. It was not meant that the liberty described in the policy might be enjoyed in full, in order to enable the master to select another port, with its additional risks. This would be using two ports in Cape Breton, the use thus made of Sydney not being by custom incidental to the use of the other. If such use of Sydney was part of the voyage, to take another port was a deviation; if it were not, either geographically or by the custom of trade or navigation, then it was itself a deviation.

The testimony of the master is direct, that when he went into Sydney he had a purpose to take a cargo at either Big Glace Bay or Cow Bay, but had not made up his mind at which. He then used Sydney for a purpose which was not incidental to the use of another port. At the time, he had no knowledge of the terms of the policy, and had no regard one way or the other to its specific provisions. The fact was, he went into Sydney before he had selected another port to load at. The policy insured him at Sydney, but his departure thence to Cow Bay, and not to New York, was a deviation.

For the determination of the party's right it is only necessary to see if the course taken was contemplated by the policy, and it is unimportant to see that the risks were increased. Yet we observe that Miramichi



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was but a short sail from Cape Breton, and the owner or master had full opportunity of determining, before sailing, at which port it was best and safest to load.

We do not mean to decide what is the construction of such a policy as respects its giving a right to elect the port, and then to use another port which prudent navigation and the custom of trade have made necessary or incidental to the use of the first. We have endeavored to show that Sydney was not thus used. But we further remark, that the supposed use of Sydney would only be justifiable or incidental to the use of a single port, theretofore selected. The use of Sydney would, under the policy, be the use of the privileged port. In the present case, no other port having been selected, the master when he entered Sydney, intending to go to Big Glace Bay or Cow Bay, as he should thereafter choose, in fact used Sydney as incidental to the purposes of trade at more than one port, until he in fact made his final choice.

It is not correct that the risks were in fact the same as if the insured had chosen, as he might have done, that port of loading which would involve the longest delay at Sydney. The contract, in giving the election to the insured, should not be construed absolutely in view only of a selection most unfavorable to the insurer. Beyond, however, the risks existing through this longest period, there was actually the risk that lasted through the time spent in examining the different ports before selecting one, be it that which involved the least or the most delay. In the present case the master was prompt, and examined but two ports. If his course can be justified on principle, the difficulty will be to find in other cases whether the time spent was necessary or not, to the due selection from not only two ports, but several more that are on that side of Cape Breton. It can not be said there was no more risk, for the one or two or

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three days then spent, might delay the vessel until the coming on of a destructive storm.

It would not change the conclusion to consider that Cow Bay was not a port. It was not within the port of Sydney. If the policy allowed only the use of that port, to depart from the direct voyage to New York was a deviation. I can not find any evidence tending to show that the bark was compelled to go into Sydney, by stress of weather or fear of disaster. She went in voluntarily for the convenience of the harbor only.

Under the evidence, I think the learned judge was right in holding, that the want of a certificate from the American Ship Masters' Association did not prevent a recovery. There was but one inference to be drawn from the testimony on this point. The company dispensed with such a certificate, and received the premium after this. As we think there was a deviation, upon the present evidence, the judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

SPHUR, J., concurred.

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Statement of the Case.

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EBENEZER S. B. BRIGGS AND MARY A. BRIGGS,  
PLAINTIFFS AND APPELLANTS, v. THOMAS M.  
PARTRIDGE, ET AL., DEFENDANTS AND RE-  
SPONDENTS.

CONTRACT, UNDER SEAL AND OTHERWISE, EXECUTED BY  
THE AGENT OF UNKNOWN AND UNNAMED PRINCIPAL—  
EFFECT OF.

In this state, many cases have been decided where it has been held, that when a contract not under seal has been made in writing by a person apparently acting on his own behalf, his unnamed and undisclosed principal may sue, and be sued upon the same, although the contract was required to be in writing by the statute of frauds, but the principle and rule of these cases fail, in the case of *a contract under seal* for the conveyance of real estate. An unnamed and undisclosed principal can not be made liable for a breach of such a contract, nor compelled to perform the same specifically, nor can he enforce the same. See the able opinion of the court in this case, for the review of numerous decisions upon this question.

Before SEDGWICK and SPEIR, JJ.

*Decided May 3, 1875.*

Appeal from judgment dismissing complaint.

This was an action for the specific performance by the defendants, the alleged vendees, of a contract for the sale of lands.

The complaint averred that the plaintiff entered into an agreement in writing, "with one L. P. Hurlburt, who was acting for, and under the authority of the defendant, whereby these plaintiffs sold, and the defendants through said Hurlburt bought" a certain described price of land, "for the sum of seven thous-

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and two hundred dollars, which said sum the defendants, through their agent the said Hurlburd, agreed to pay as follows : one hundred dollars on the signing of the agreement of sale aforesaid, three thousand two hundred dollars by assuming a certain mortgage then subsisting on said property, and the balance in cash, before the execution and delivery of a deed by these plaintiffs to the defendants ;" that it was further agreed that the plaintiffs should deliver the deed, and that the defendants should accept the same, and pay the balance of the purchase money on the first day of February, 1874 ; that the defendants through said Hurlburd, paid on the delivery of the agreement one hundred dollars ; that on the said first day of February, 1874, the plaintiffs were "ready to carry out on their part the agreement aforesaid, by executing and delivering to said Hurlburd, for and on account of said defendants, a good and sufficient deed of the premises herein before described," whereas the defendants wholly failed on their part to fulfill said agreement, or to take title to said property, but on the contrary refused, and they have ever since refused so to do ; and the plaintiff demanded judgment that the defendants perform said agreement, and pay to plaintiffs the sum of three thousand nine hundred dollars.

The answer contained a general denial of the allegations of the complaint.

The action came on for trial at special term. Plaintiff's counsel, in opening the case, said that the agreement on which the plaintiff relied was in writing ; that it was made by the plaintiff as vendor, and Llewellyn P. Hurlburd as vendee ; that the written instrument did not show but that Hurlburd was a principal party ; that it was signed and sealed by Hurlburd individually ; that the name of defendant Partridge did not appear in the instrument, but that plaintiff would prove that the said Hurlburd was acting solely for and under the di-

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rection of Thomas M. Partridge, who paid, or caused to be paid, the first payment under the contract ; that said Hurlburd was the agent and trustee of said Partridge in the transaction, and that the authority given by Partridge to Hurlburd was oral.

On their opening and on the complaint, the defendant's counsel moved to dismiss the complaint on these grounds: 1st, that the facts stated in the opening and by the complaint did not constitute a cause of action ; 2d, that it was not competent to vary the terms of the written contract, by parol proof that the party who executed the same as principal was not a principal, but an agent.

The plaintiff's counsel asked leave to put in his testimony for the purpose of proving this cause of action, and also of moving "if necessary for a reformation of the written agreement to enforce which the action had been brought." The court refused to give this leave. The plaintiff's counsel offered to prove that "Hurlburd was constituted, by parol, agent to enter into and execute the contract in behalf of the defendant Partridge ; that at the time the contract was made, the plaintiff did not know that Partridge was the real principal ; that the plaintiff tendered a deed to Hurlburd, and did not at that time know that Partridge was the real principal."

Thereupon the complaint was dismissed, and exception taken.

*Edward D. McCarthy*, for appellant.

*Wm. F. Shepard*, for respondent.

BY THE COURT.—SEDGWICK, J.—There can be no doubt that in this state many cases have considered it law, that when a contract not under seal has been made in writing by a person apparently acting on his own

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behalf, his undisclosed principal may sue and be sued thereon, and although the contract was required by the statute of frauds to be in writing. The reason of this rule, and the exceptions to it and its limitations, have not been much discussed. Another class of cases have held, that when the cause of action depends upon the written contract, oral evidence can not vary it so as to charge a person who is not a party to it, by proof that he was the principal in fact of the party to it. The reasoning had in *Fenley v. Stewart* (5 *Sandford Sup'r Ct.* 101) to support this conclusion has not been, as far as I know, disapproved by any case in the court of appeals. But, in my view, it is not necessary for us to decide that these cases required a reversal of the present judgment, because, 1st, the judgment below must be sustained by authority applicable to this particular case; 2nd, the reason of the rule that sustains an action against an unknown or unnamed principal upon a contract in writing made by his agent, apparently in his own behalf, and affecting personal property, fails in the case of a contract for the conveyance of real estate.

*Townsend v. Hubbard* (4 *Hill*, 351), in the court of errors, sustains the present judgment. That case, like the present, had regard to a contract for the sale of real estate, under seal. The contract stated that it was made between certain parties of the first part by their attorney, as vendors, and the parties of the second part. The contract ended: "In witness whereof, the said Harvey Baldwin, as attorney of the parties of the first part, and the parties of the second part, have hereunto set their hands and seals," &c., and was signed, "Harvey Baldwin, (L. s.)." It was held that this was not the contract of the principal (although Harvey Baldwin was authorized by them to make a contract for them, and in their names under seal), so as to make a valid contract under the statute of frauds. The argument

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of counsel called the attention of the court to the fact, that although the contract was under seal, yet it would have been valid without a seal; but the court's decision implied that when the instrument was in fact sealed, no other part of the contract than the signature and seal could be looked to, to determine by whom it was made. The result of this decision, of course, forbids, in a like case, oral proof being given to show that although one person made the contract, so far as its contents were concerned, he in fact acted on behalf and as agent of another.

This gives great force to the fact of sealing, and a seal is often regarded as a mere form, having no intrinsic significance. It is not, however, a mere form, as the law stands, because if the contract were not under seal, an equitable action for its performance would cease after ten years, and an action at law based upon any promises to pay money contained in it would cease in six years. If it were sealed, there might be action upon some of its provisions during twenty years. It is not merely a formal rule that requires great certainty in regard to a cause of action that may last so long.

This case was not at all affected by *Worrall v. Munn* (5 *N. Y.* 246). It was recognized as authority for the proposition that the contract was void within the statute of frauds, because it was not properly executed by the vendors or their agents. It was again referred to as establishing this in *Burrell v. Root* (40 *N. Y.* 496). In case of a contract not under seal, where the principal is named in the body, while it is signed by the agent individually, the contract has been inferred against the principal (*Pinckney v. Hagadorn*, 1 *Duer*, 89; *Tallman v. Franklin*, 14 *N. Y.* 584); but in *Squier v. Norris* (1 *Lans.* 282), in which, like our case, the contract did not refer to the principal, it was held that the principal was not bound. The cases already cited, and *Williams v. Christie* (4 *Duer*, 29), and *Mason v.*

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Breslin (2 *Sweeny*, 386), call for the affirmance of the present judgment.

But, second, if we had no authority to guide us, excepting such cases as refer to personal property. I should be of opinion that they were not meant to govern contracts for the sale of real property, irrespective of any technical rule. In none of the cases that I know, has there been any attempt to enforce against a principal any obligation different from that described by the written contract. On the contrary, the fundamental position is, that the agent is the principal in legal effect, and that delivery to or performance by the agent is delivery to or performance by the principal. Again, the undisclosed agency was created orally or in writing. If the former, it is valid and not against the statute of frauds, so far as its form goes. If in writing, the law permits its performance according to its terms—that is, a man may take personal property to himself, so as to receive the title to and dominion over it, and yet the property be in fact another's, for whom he in fact acts, whether the person making the transfer knows it or not. The principal receives the consideration and makes the obligation.

When, however, the contract is for the transfer of land, those propositions are not correct. The covenant is to deliver to Llewellyn P. Hurlburt a deed conveying the fee simple; and the offer of proof was that the deed was made to Hurlburt and tendered to him, as agent and trustee for the defendant Partridge. This would not convey the property to, or give any interest in it to the defendant Partridge. The delivery of the deed to Hurlburt was not delivery to Partridge, in fact or in legal effect. The terms of the deed were conclusive as to that. Furthermore, the so-called agency was not made in writing, and Partridge could not compel Hurlburt, after receiving the title, to convey it to him. Where a man merely employs another person



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by parol, as an agent to buy an estate, who buys it for himself, and denies the trust, and there is no written agreement, "he can not compel the agent to convey to him, as that would be directly in the teeth of the statute of frauds" (12 *Sugden on V.*, 8th Am. ed., ch. 21, § 1, 15; *Levy v. Brush*, 45 *N. Y.* 589). Under our statute it would be immaterial that the so-called principal furnished the agent to make the contract in the name of the latter, with a part or whole of the consideration money afterwards paid. Nor would the vendor in the contract have greater rights against the so-called principal, if the agency had been formed by a writing. The present case, and what we here say, refer to a contract in which the so-called agent appears as principal in all its parts. Such a contract could only be performed by the vendor by delivering or tendering a deed to the person named in the contract, *i.e.* the so-called agent. But, as we have noticed, the law makes it conclusive that the title goes to the grantee named in the deed, so that, as matter of fact, he can not receive it as simply an agent or representative of the so-called principal. It may be that if the power of attorney were in writing, as between two parties, the statute of frauds might be satisfied, so as to compel the agent to convey; but it would not be upon the ground that anything the vendor had done had vested the title in the principal, but would rest upon the promise or the contract obligation of the agent to convey, or upon the facts of the case that might create a trust saved by the statute. So, if the agency were created by writing, a vendor can say nothing more than that upon performance, the contract vendee will be bound to convey. It is not true that before that time—that, in fact, by force of legal principles—the vendee acts for his principal or stands in the place of his principal. The consequences of the agency being made in writing are, however, not under review, as the agency

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Opinion of the Court, by SEDGWICK, J.

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was alleged by the plaintiff to have been created by words.

If we are correct, then : 1st, the so-called but unnamed principal, in a contract for the sale of land, on its performance receives and can receive no part of the consideration which the vendee receives, and which holds him ; 2d, proof of the oral authority, for the purpose of showing that by virtue of it the title to the land would go to the so-called principal, would be proof of a transaction void by the statute of *frauds*. In these respects such a contract is unlike a contract for the sale of personal property. Several other points of dissimilarity might be noticed, but perhaps without benefit.

Therefore, I think this judgment should be sustained. Having passed upon the merits, it is not necessary to examine, what is very doubtful, if the complaint or the offer of testimony assert that any tender of performance was made by the plaintiff.

The judgment appealed from is affirmed, with costs.

SPEIR, J., concurred.

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Statement of the Case.

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MARY McLAIN BY JAMES McLAIN, HER GUARD-  
IAN, PLAINTIFF AND APPELLANT, v. THOMAS  
VAN ZANDT, DEFENDANT AND RESPONDENT.

CONTRIBUTORY NEGLIGENCE.—TRIAL BY JURY.

In this case the complaint was dismissed on the motion of the defendant at the trial, when the plaintiff had rested, for the reason that the plaintiff's case had failed because it clearly appeared that the plaintiff's negligence had contributed to the injury.

The plaintiff asked the court to submit this question to the jury and the court refused.

On the argument at general term, the main point of error claimed by the appellant, was the refusal of the court to submit the question of the plaintiff's negligence to the jury. That thereby the plaintiff has been denied *the right* of a trial by jury, and been compelled to submit her claim to the decision of a single judge.

*Held*, by the court,

That if the evidence on the trial clearly established the plaintiff's negligence, and was undisputed, and the inference from that evidence indisputable, the court can pronounce the law applicable without going through the form of taking a verdict of the jury on the point.

The plaintiff must make a *prima facie* case, must show that the injury was not caused partly by negligence with which the plaintiff was chargeable.

If there is an entire want of proof as to the care the plaintiff used, the complaint should be dismissed (*Warner v. The N. Y. Cent. R. R. Co.*, 465).

On the whole case, it appearing clearly that the child was *non sui juris*, and the father negligent, the dismissal of the complaint by the court was affirmed.

Before SEDGWICK and SPEIR, JJ.

*Decided May 3, 1875.*

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Appellant's points.

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Appeal from order denying motion for new trial made upon case and exceptions.

The pleadings do not appear in the case. By the case it appears that on the trial of the action, the plaintiff proved the following facts: The defendant was owner of two houses, numbered 22 and 24, East Twelfth street. In front of No. 24 was a deep area, on or along the street, guarded only by a coping stone four inches high. In October, 1865, the plaintiff was three years and eight months old. At that time, her father was standing with her, three houses from No. 22, the house No. 24 being between them and No. 22. They lived in No. 22. The father told the plaintiff "to go to her ma, and away she went, and I watched her to see whether she would go in, and just as she went there she lifted her foot to go up—there is only one step to the door—as she lifted her foot to go up that step, she fell into the area-way." She was seriously injured. On the plaintiff resting her case the defendant's counsel moved to dismiss the complaint. The motion was granted, and exception was taken by plaintiff. A case and exceptions having been settled, a motion was made at special term for a new trial. The motion was denied, and it is from the order entered on this denial that the plaintiff now appeals.

*A. K. Hadley*, attorney for appellant, and *I. T. Williams*, of counsel, argued:—I. The question of negligence presented in this case is a question for the jury, and not for the court. (1) It is not proposed here to discuss the question of negligence. It was not in any manner or degree discussed before the court below, by the counsel for the plaintiff. It is no more a question for the court here, than it was at the trial. (2) The question here presented is a question of *forum*. The right here asserted is the right of trial by jury. The complaint here made is that the plaintiff has been de-

## Respondent's points.

nied the right of trial by jury, and been compelled to submit her claim to the decision of a single judge. (3) To establish the proposition here asserted, the following decisions are relied upon: Mackey v. N. Y. Cent. R. R. Co., 35 N. Y. 79; Wolfkiel v. Sixth Avenue R. R. Co., 38 Id. 50; Davenport v. Ruckman, The Mayor, &c., 37 Id. 568; Driscoll v. Newark, &c. L. & C. Co., Id. 637; Hulbert v. N. Y. Central R. R. Co., Id. 145; Jetter v. N. Y. and N. H. R. R. Co., 2 Keyes, 154; Matteson v. N. Y. Cent. R. R. Co., 58 Barb., 182; Robinson v. N. Y. Cent. R. R. Co., 65 Id., 146; O'Mara v. Hudson River R. R. Co., 38 N. Y. 445; The Sioux City and Pacific R. R. Co., plaintiff in error, v. Harry G. Stout, 17 Wal. U. S. Reps.

II. It is a matter of record, and therefore a part of the public history, of which this court will take judicial notice, that for this same injury a suit was brought against the mayor, aldermen and commonalty of this city (the excavation above referred to being in the public street), under the authority of Davenport v. Ruckman (The Mayor, &c.), above cited. That action was brought to trial at a circuit court in this city. The authority of the nonsuit granted in this case was invoked upon a motion for a nonsuit in that. The motion was, notwithstanding, denied, and the question of negligence was submitted to the jury, who found a verdict for the plaintiff. It is claimed that this is an authority in point on this appeal.

*Sherwood & Howland*, attorneys for respondent, John Sherwood, of counsel, cited many cases in opposition to the point claimed by appellant, among which are the following: Morrison v. Erie R. R. Co., Ct. of Appeals, published in Albany Law Journal, Jan. 9, 1875; Flynn v. Hutton, 43 How. Pr. R. 333; Hackford v. N. Y. Cent. R. R., 53 N. Y. 654.

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Opinion of the Court, by SEDGWICK, J.

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BY THE COURT.—SEDGWICK, J.—On the argument it was not contended that the defendant was not liable for any other reason than that the plaintiff's case failed on the point of contributory negligence. The appellant's counsel took the single ground, that the question as to negligence on the part of plaintiff, was for the jury and not for the court. He declined to discuss that question, because it was no more a question for the court on appeal, than for the court on the trial, and the claim was that the plaintiff had been denied a trial by jury, and had been compelled to submit his cause of action to the decision of a single judge.

If the counsel meant to insist that if the evidence in this case was undisputed and the inference from that evidence undisputable, still it must go to the jury on the question of the existence of contributory negligence, we can not agree with him. In such a case, the duty of the jury would be to find in a certain way, as matter of law, and therefore the court can pronounce the law without going through the form of taking a verdict on the point. Beyond this, the plaintiff must, to make a *prima facie* case, show that the injury was not caused partly by negligence, with which she is chargeable. If there is an entire want of proof, direct or circumstantial, as to the care she used, the complaint should be dismissed (*Warner v. The N. Y. Central R. R. Co.*, 44 N. Y. 465).

If the counsel, however, argued that the facts of the present case did not call indisputably for the conclusion that the plaintiff had failed to show that she was not in fault, it is necessary to examine the evidence. There was no doubt that the child was *non sui juris*, and, therefore, that no fault or want of care, on the part of her personally, would relieve the defendant from responsibility. The defendant must respond unless the father was guilty of fault or negligence in permitting the child to go, or rather sending the child

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Opinion of the Court, by SEDGWICK, J.

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to the place where she tripped and fell. It is not the case of letting the child go to the highway to meet whatever may happen, but the actual risks were seen and known by the father.

The child being *non sui juris*, her qualities are fixed by law and to be learned from it. She was incapable of self-control and personal protection (*Mangam v. Brooklyn R. R. Co.*, 38 *N. Y.* 459). She could not personally exercise that degree of care which becomes instinctive at an advanced age (*Hartfield v. Rope*, 21 *W. R.* 618). This want of discretion and this incapacity were obvious to the father (*Ihl v. Forty-second street R. R. Co.*, 47 *N. Y.* 323).

The conclusion seems direct, that, if the father sent the child, who was incapable of self-control and of using discretion, to a set of circumstances that called for the exercise of self-control and discretion, he was in fault. These circumstances were that the child had to pass an open area, along the street, and up a step at the end of the area. If she tripped and fell towards and into the area, there was great likelihood of serious injury. These facts suggest to me, that common prudence calls for the use of discretion in walking along such a danger, and that it is ordinarily used. It may be instinctively and oftentimes it is consciously used. Everyone when passing such a place, walks with more than usual care, to prevent accident from tripping or loss of balance. Especially on going up a step (for all steps are not of uniform height and width) is an educated discretion used, as to how far the foot should be raised and where it should be placed. As the place called for the exercise of discretion, the father was chargeable with neglect in sending to it the child incapable of exercising discretion.

This result would not have called for the dismissal of the complaint, if the child in going, as matter of fact, did what a person of ordinary prudence would have

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Opinion of the Court, by SEDGWICK, J.

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done. Then the injury would be solely caused by the negligence of the defendant. According to *Warner v. The N. Y. Central R. R. Co.* (*ubi supra*), this must be shown by direct evidence, or by inference from the facts. In the present case, the testimony did not disclose the facts, from which an inference could be drawn as to whether the child at the time was careful or the reverse. The father saw her trip and fall, but there was no proof as to the cause of the tripping. There was no evidence as to the condition of the pavement, or whether there was anything lying upon the pavement. If the tripping was occasioned by something external to the child, it was consistent with the facts that ordinary prudence could have avoided it, or that the child was taking a hazardous course. If it were not external to the child, but because of her childish weakness in body or mind, that would not show that in fact she was free from fault, but would be a reason for deeming the father negligent in sending her near to such danger.

On the whole case, the child being *non sui juris*, and the father being negligent, the order appealed from should be affirmed, with costs.

SPEIR, J., concurred.

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Statement of the Case.

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LOUISA G. ARMOUR, PLAINTIFF AND APPELLANT,  
v. WILLIAM M. LESLIE, DEFENDANT AND RE-  
SPONDENT.

**DEMURRER.—COUNTER-CLAIM.**

THE LATTER NEED NOT STATE FACTS SUFFICIENT TO CONSTITUTE A  
DEFENSE TO THE CAUSE OF ACTION SET FORTH IN THE COMPLAINT.

The defendant in this case, after a general denial, with some exceptions, attempted to set up a counter-claim in the answer. The plaintiff demurred to the counter-claim, on the ground "that the same does not state facts sufficient to constitute a defense to the plaintiff's complaint."

The court below overruled the demurrer, without prejudice to the right of plaintiff to move that the defenses in the answer be made more definite and certain.

*Held*, on appeal, that this demurrer in its present form notifies the defendant that the objections to the pleading are not of a general nature, but confined to the special matter stated therein, namely: *the counter-claim*; therefore, the order below must be examined upon the nature of this special ground of demurrer.

The code distinguishes between a defense and a counter-claim.

It is not necessary that a counter-claim should contain facts sufficient to make a defense, and, therefore, it was impossible for the court below to properly make any other order than that appealed from. It would be clearly wrong in this case, for the court to decide that the allegations did not constitute a counter-claim, because they were not sufficient as a defense. Order affirmed.

Before SEDGWICK and SPEIR, JJ.

*Decided May 8, 1875.*

Appeal from an order of special term, overruling the plaintiff's demurrer to the counter-claim set up in the defendant's answer.

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Opinion of the Court, by SEDGWICK, J.

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*C. Bainbridge Smith*, for appellant.

*Henry A. Root*, for respondent.

BY THE COURT.—SEDGWICK, J.—The action was for a tort. The answer, after a general denial, except as to admissions thereafter specifically made, in further answering made several allegations, and ended by alleging “that there is now due, owing, and unpaid by this plaintiff, the defendant therein, to this defendant the plaintiff therein, the balance of the said judgment recovered as aforesaid of one hundred and fifty-two dollars, and interest thereon from the 4th day of August, 1874, which said sum, so due, this defendant, recoups, offsets, and counter-claims against any claim this plaintiff may demand, by reason of the allegation in the complaint herein, and all which facts this defendant pleads and shows to this court in mitigation of any damages the plaintiff may claim herein.” The answer demanded judgment that the complaint be dismissed, and that the defendant have judgment in the said sum of one hundred and fifty-two dollars, and interest.

The plaintiff demurred “to the counter-claim set forth in the answer of the above named defendant, on the ground that the same does not state facts sufficient to constitute a defense to the plaintiff’s complaint.”

The court at special term “ordered that said demurrer be overruled, with costs, but without prejudice to the right of plaintiff to move that the defences herein be made more definite and certain, upon payment by said plaintiff to defendant of the costs of the demurrer.”

By the former practice, demurrer contained the general or special ground of objection, and the demurring party was held to the ground as stated (1 *Chitty’s Pl.* 666-7). It is true that the code does not

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Opinion of the Court, by SEDGWICK, J.

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require that a demurrer to an answer or reply, should contain a special ground of objection, and a demurrer stating "that the answer is insufficient," allows the plaintiff to avail himself of any insufficiency which goes to the merits of the action (*Arthur v. Brooks*, 14 *Barb.* 535). Without deciding that a demurrer, stating that the plaintiff demurs to the answer, would not also be sufficient, it is clear that the present demurrer, by its form, notifies the defendant that the objections are not of a general nature, but confined to the special ground stated. If any other ground may be examined on the trial of the issue of law, the opposite party will be misled. Therefore, the order below must be examined upon the nature of the special ground of demurrer stated, viz., that the counter-claim did not state facts sufficient to constitute a defense. The code distinguishes between a defense and a counter-claim. It is not necessary or admissible that a counter-claim contain facts sufficient to make a defense. It was impossible, therefore, for the court to make any other order than the one appealed from. It was not then or now necessary to look into the answer to see if the matters which it attempted to use as an offset, recoupment, counter-claim, and in mitigation of damage, set up a sufficient defense, in whole or in part.

If the court below had sustained the demurrer, then, so far as the record disclosed, it would appear that the court had examined whether the matters set up partly on a counter-claim constituted a defense, and had found as matter of law that they did not, and on the trial it might be plausibly urged that such adjudication was final for the purposes of the action.

Whatever embarrassment there is to the plaintiff, comes from the irregular and informal attempt to make one set of allegations in an answer serve the purpose of a defense and counter-claim. The court below preserved the rights of the plaintiff, by reserving to her

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Opinion of the Court, by SEDGWICK, J.

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leave to move to make the answer definite and certain, and no doubt, irrespective of this leave, the plaintiff had the right to move in addition, under section 150 of the code, that the defense and the counter-claim be separately stated. Until this was done, it is doubtful whether the court could examine the sufficiency of the matters pleaded to constitute a counter-claim, but it would be clearly wrong to say that allegations did not constitute a counter-claim, because they were not sufficient as a defense.

The appellant also objects that leave was not given below to serve a reply. This was not erroneous, at least unless the plaintiff asked for such a provision, and by the papers before us it does not appear that she did. But, while thinking that the court below was right in its action, I should be willing that the order be modified so as to allow the plaintiff to reply, upon payment of costs of demurrer and of appeal, if it were possible, which it seems me it is not, to wholly affirm, and yet modify the order.

The order below should be affirmed, with costs.

SPEER, J., concurred.

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Opinion of the Court, by SEDGWICK, J.

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THE ATLANTIC & PACIFIC TELEGRAPH COMPANY, PLAINTIFF, v. WILLIAM E. BARNES, ET AL., DEFENDANTS.

RE-ARGUMENT OF APPEAL.—LEAVE TO APPEAL TO THE COURT OF APPEALS.

Where the general term has made a thorough examination of the case at a former hearing, a re-argument should be denied. Where the rules and principles of law involved are important, and affect large and varied public interests; and where, in the opinion of the court, the rules and principles of law that should control, have not been fully settled by the court of last resort in this state, leave to appeal to the court of appeals should be granted, on proper conditions.

Before SEDGWICK and SPEIR, JJ.

*Decided May 3, 1875.*

Motion for re-argument, or that defendants have leave to appeal to the court of appeals.

This case was argued at February general term, 1875, upon exceptions directed to be heard in the first instance at general term. That general term directed that judgment be entered for plaintiff in the sum of two hundred and eighty-one dollars and forty-four cents. The facts of the case, and the opinions of the judges, appear in this report at page 40.

*J. Edwin Leary*, for the motion.

*Charles Edward Souther*, opposed.

BY THE COURT.—SEDGWICK, J.—The motion for re-argument should be denied. The general term made a thorough examination of the whole case.

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Opinion of the Court, by SEDGWICK, J.

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I, however, think that the defendants should have leave to take the case to the court of appeals. The rule of law involved is important, and affects many persons that hold, in the large and varied business of this state, the relations that subsisted between the parties to this action. As yet, the court of last resort in this state has not settled the principles that should control. In *Hunt v. Roberts* (45 *N. Y.* 696), Judge RAPALLO, said that the court "was clearly of opinion that after a breach which will justify the termination of the contract, the surety has the right to require that the contract with the principal be terminated, and the claim against the surety confined to the damages then recoverable." Whether such a rule is to be applied, through inferences to be drawn from it, to a case like the present, has not been determined, so far as I know, by the court of error or of appeals. These considerations bring the present motion within *Butterfield v. Radde* (38 *N. Y. Sup'r Ct.* 44).

The motion that defendants have leave to appeal to the court of appeals, should be granted, on condition that defendants give notice of appeal, and file security within thirty days. In case of perfecting the appeal there should be ten dollars costs of motion and disbursements, to abide event, otherwise the plaintiff to have the like amount of costs and their disbursements.

SPEIR, J., concurred.

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Opinion of the Court, by SEDGWICK, J.

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**FRANZ DELCOMYN, PLAINTIFF AND APPELLANT,  
v. JOHN C. CHAMBERLAIN, ET AL., DEFEND-  
ANTS AND RESPONDENTS.**

**TAXATION OF COSTS.**

In the taxation of a bill of costs, including fees paid to a commissioner for the examination of the plaintiff, where the court, making the order for the commission, made no order for the taxation of the costs, and where no person was examined except the plaintiff, the fees paid to such commissioner should not be allowed. A different practice would lead to abuses difficult to check.

**Before SEDGWICK and SPEIR, JJ.**

*Decided May 8, 1875.*

**Appeal from order, directing a re-taxation of costs.**

The plaintiff took out an order to examine himself and other persons as witnesses, under a commission issued to London. The plaintiff who lived in London, was, in fact, the only witness examined. The plaintiff recovering judgment, the clerk in taxing his costs allowed, as a disbursement, the amount paid to the commissioner as fees. The court below ordered a re-taxation, disallowing the commissioner's fees. The appeal is from this order.

*George De Forest Lord*, for appellant.

*Benj. F. Dunning*, for respondents.

**BY THE COURT.**—SEDGWICK, J.—The court making the order for a commission had power to direct, as one of the terms, that a disbursement of the kind in question might be taxed. In the absence of such a

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Statement of the Case.

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provision, we think the court below made a proper disposition of the application. We are of opinion that a different practice would lead to abuses difficult to check.

The order is affirmed, with ten dollars costs.

SPEIR, J., concurred.

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JOHN P. O'SULLIVAN, PLAINTIFF AND APPELLANT,  
v. MARSHALL O. ROBERTS, DEFENDANT AND  
APPELLANT.

EVIDENCE.

RECEPTION OF, WHEN ERROR, NOT CURED BY SUBSEQUENT WITHDRAWAL OF SAME IN A TRIAL BEFORE JURY.

This action was brought to recover the value of certain services performed by the plaintiff for the defendant, in Mexico, claimed to be worth fifty thousand dollars, but for which plaintiff recovered in this action ten thousand dollars, from which judgment both parties appealed.

This court on appeal, held that there was a valid agreement between the parties that would support the claim of the plaintiff on a *quantum meruit*, and that the real question in the case was as to the amount that plaintiff should recover; but on the review of some of the exceptions to evidence received under objection by the court below, a new trial was ordered. These exceptions are embraced in the following points:

The plaintiff, as a witness, had stated that at Orizaba, on the way from Vera Cruz to Mexico, he fell sick, and in consequence thereof he stayed at Orizaba six weeks. He was then asked, "What expenses were you put to by your illness there?" and he answered after objection, &c., that his expenses were six or seven hundred dollars, gold.

The general term held this testimony to be inadmissible, and that the error of the court *was not cured* by the subsequent di-



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Statement of the Case.

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rection of the judge at the close of the trial, in his charge to the jury, to disregard it, and his order to strike it out from the testimony in the case.

This evidence had already (at the time it was stricken out) had its effect upon the jury, and it can not be said that their judgment was not influenced thereby. The cases of *Anderson v. The Rome, W. & Ogd. R. R. Co.* (54 *N. Y.* 334), and *Erben v. Lorrillard* (19 *N. Y.* 303), are precedents clearly against the admission of this testimony.

There was also error in allowing the jury to take into consideration the subject and expense of entertainments given by the plaintiff in Mexico to the emperor and empress, and to the emperor's cabinet ministers, when there was no proof before them of their value or of what they consisted.

Before SEDGWICK and SPEIR, JJ

*Decided May 3, 1875.*

This action is brought to recover for the plaintiff's services in going to Mexico, in the year 1866, at the request of the defendant, and procuring a ratification of a prior grant in relation to the New York and Tehuantepec Railroad and Steamship Company, from the then imperial government of Mexico. The complaint alleges that the services were successfully performed by the plaintiff, and that they were reasonably worth fifty thousand dollars.

The answer is a general denial, and sets up that the plaintiff undertook to procure a ratification of said grant by Maximilian, and that defendant agreed to pay him, therefor, the sum of two thousand dollars in coin, and no more, which sum was paid by him to the plaintiff. It further sets up that the defendant agreed, in the event that said grant was valid and subsisting, and a valid and indisputable title to said grant duly approved by Maximilian, and the formation of said corporation to construct and operate the road under said grant, to issue to said plaintiff out of the capital stock to the nominal amount of fifty thousand dollars.

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Statement of the Case.

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The answer further sets up, that the prior grant had lapsed, and that the prior company had nothing which it could convey to the defendant, and the alleged ratification was of no force or effect. It also alleges a counter-claim of money, to the extent of a thousand dollars, advanced to the plaintiff.

The reply put in issue the counter-claim. At the close of the case, the following question was submitted to the jury, "Did the defendant, Marshall O. Roberts, after the return of the plaintiff from Mexico, accept the result of the plaintiff's mission to Mexico, as a performance of the plaintiff's part of the agreement." To which the jury answered, "Yes."

The jury also found a general verdict for the plaintiff, for thirteen thousand five hundred and ninety-three dollars and fifty-seven cents, as the value of the services of the plaintiff, deducting one thousand dollars, the counter-claim.

A motion was made by the plaintiff to amend the general verdict by making it seventy-three thousand nine hundred and thirty-two dollars and five cents, claiming that amount as the contract price, on the ground that the only point at issue, was whether the plaintiff had performed or the defendant had accepted what the plaintiff had done as a performance of the contract. This motion was denied, and the plaintiff excepted. The plaintiff also moved on the same ground on the special verdict, which was denied, and an exception taken.

The defendant's counsel moved for a new trial upon the judge's minutes, which was denied, and they excepted.

Both parties appeal.

*James H. Fay*, attorney for the plaintiff; *Albert Stickney*, of counsel.

*Brown, Hall & Vanderpoel*, attorneys for defend-

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Opinion of the Court, by SPEIR, J.

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ant; *A. J. Vanderpoel* and *Edwards Pierpont*, of counsel.

BY THE COURT.—SPEIR, J.—Comonfort the president of the republic of Mexico, on September 7, 1857, granted to a corporation of citizens of the United States, known as the Louisiana Tehuantepec Company, the privilege of constructing a railroad across the isthmus of Tehuantepec. In March, 1866, the defendant negotiated with the Louisiana Tehuantepec Company, for the purchase of this grant, and on March 22, 1866, wrote to Mr. Louis A. Hargous, who represented the company, the following letter :

“DEAR SIR,—In relation to the Louisiana and Tehuantepec Company, I would say, if I can get a legal assignment of all the rights of said company confirmed by the government of Mexico, I will build the proposed railroad, and give three million dollars in stock of the company which may be formed for that purpose. Yours very truly,

MARSHALL O. ROBERTS.”

At this time Maximilian, who had entered Mexico by aid of the French government, was in possession of the city of Mexico, claiming to be emperor of Mexico, and was sustained there by the aid of France.

Juarez was president of the republic of Mexico, and during this period lived in different cities of Mexico.

After the defendant's purchase, he executed a power of attorney, on April 2, 1866, to Mr. Henry Wyckoff, to proceed to Mexico and obtain the permission and sanction of the imperial government to change the name of the company, and call it the New York, Tehuantepec and Pacific Railroad and Steamship Company, and to transfer all the rights, powers, property, franchises, charters, and privileges of every name and kind of the Louisiana and Tehuantepec Railroad Company, to the

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Opinion of the Court, by SPEIR, J.

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New York, Tehuantepec and Pacific Railroad and Steamship Company.

It appears that the defendant, on the suggestion of Marquis de Montholon, was induced to allow the plaintiff to accompany Mr. Wyckoff on the mission. Accordingly, Wyckoff and the plaintiff started for Mexico on April 10, 1866, were shipwrecked a few days out from New York, and returned to New York. It was then concluded to substitute the plaintiff for Wyckoff on this mission, and on April 25, 1866, the plaintiff, at defendant's request, sailed from New York and went to Mexico. He was taken sick, and confined by illness more than six weeks at Orizaba, and reached the city of Mexico in June, 1866. He remained in the city of Mexico about four months, and returned to New York about November 16, 1866, and delivered into the defendant's hands the following, as the result of his mission:

"Maximilian, Emperor of Mexico, having heard our council of ministers, we decree—Permission is given to the Louisiana Tehuantepec Company, privileged for the opening of an inter oceanic communication by the isthmus of this name, by the decree of September 7, 1857, and conformably with Article 23 of the same decree, that it may transfer the residence of its directorship from New Orleans to New York, and change its name to that of New York and Tehuantepec Railroad and Steamship Company.

"Given at Mexico on the 12th of October, 1866.

(Signed)

MAXIMILIAN."

On October 15, 1866, Juarez, the president of the republic, declared the privilege theretofore granted to the Louisiana and Tehuantepec Company, for the reasons in his declarations stated, lapsed and insubsistent; and gave to a new company, to wit, the Tehuantepec Transit Company, the privilege which had theretofore been held by the Louisiana Tehuantepec Company.

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Opinion of the Court, by SPEIR, J.

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So that in three days after the imperial sanction had been obtained by the plaintiff, a decree was issued by the president of the republic of Mexico, declaring that the privilege granted by the Louisiana Tehuantepec Company had lapsed. When the plaintiff first arrived in New York from Mexico, the repudiation of this grant by Juarez, and the new grant which had been made to Messrs. La Reintrie & Knapp, were known to both plaintiff and defendant.

It was conceded by both sides on the trial, at its close, that the defendant was to pay the sum of two thousand dollars towards the plaintiff's expenses, and the jury by their verdict acted upon that understanding, by allowing the offset of one thousand dollars, admittedly borrowed of the defendant. This question, then, involving the moneyed transaction between the parties, may be considered at rest.

It may be assumed, I think, that the foregoing is a fair statement of the history and circumstances under which the parties entered upon this enterprise; and which seemed to me to be necessary to a proper understanding of the many opposing views and opinions on the evidence and law, which have arisen on the trial.

A contract of some kind plainly existed between the plaintiff and defendant. The question is,—What was that contract, both as to compensation, the services required to be performed, and the performance?

The plaintiff contends that Mr. Wyckoff, who was first employed by the defendant to perform the services required on this mission, and in whose place the plaintiff was substituted, acted for the defendant, and with his approval, in arranging the terms of the agreement. Accordingly, it was agreed, at Mr. Wyckoff's suggestion, that the plaintiff should write a note to him setting forth those terms. The following is the note :

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Opinion of the Court, by SPEIR, J.

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"MY DEAR MR. WYCKOFF,—Will you please to say to Mr. Roberts that I accept the offer made by you, for an amount of New York and Tehuantepec stock that will produce fifty thousand dollars, for which consideration I agree to go to Mexico and co-operate with you in obtaining the imperial sanction to the proposed company.

"Furthermore, I desire that Mr. Roberts will associate me with you as his representative in accomplishing the proposed object.

"Finally, please arrange with Mr. Roberts, in accordance with all usage, that a liberal sum may be appropriated for our just expenses, to and from Mexico."

The plaintiff claims that Mr. Wyckoff or the defendant handed to him a paper, of which the following is a copy (the original having been stolen from the plaintiff):

"NEW YORK, April 10, 1866.

"MY DEAR SIR,—I approve of the proposition made to you by Mr. Wyckoff, guaranteeing you fifty thousand dollars in stock of the projected New York and Tehuantepec Railroad and Steamship Company, in consideration of you assisting him in obtaining the sanction of the imperial government to the said organization. I am happy to associate you with Mr. Wyckoff in the business he has undertaken, and hope that your joint efforts will be successful, both for my sake and that of his Mexican majesty.

"I concur, when the matter is complete.

"MARSHALL O. ROBERTS."

It is not denied that the first of the two preceding letters was written by Mr. Wyckoff for the plaintiff to copy, to be addressed to the former, and it is proven by both to contain the terms of the contract. The defendant evidently had knowledge of this letter, and the purpose for which it was written. He says in his letter to the plaintiff, "Mr. Wyckoff made the arrangement

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Opinion of the Court, by SPEER, J.

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for you ;" and again. " Mr. Wyckoff, being acquainted with the whole subject, drew up the paper in your behalf, and can be applied to, if I misstate the facts." This is the only paper in the case proven to have been drawn up by Mr. Wyckoff, containing terms of the agreement.

The other letter, dated April 10, 1866, purporting to have been signed by the defendant, is claimed by him to be a forgery. He states positively under oath that he did not sign it, that he never authorized it, and that his signature is a forgery. Evidence was given on the point on both sides, and being contradictory, the court left the question to the jury.

The first letter is not questioned by either party, and being recognized by the defendant, contains of itself, I think, a valid agreement. It was written, and in the plaintiff's possession, before he left for Mexico, and after the defendant had made his contract of March 22, 1866, with Mr. Hargous, the terms of which were, " if I can get a legal assignment of all the rights of said company confirmed by the government of Mexico, I will give three million dollars in stock of the company which may be formed for that purpose." On the part of the plaintiff the terms were, " he agreed to go to Mexico, and co-operate with Wyckoff in obtaining the imperial sanction to the proposed company." On the part of the defendant, the consideration was the payment of an amount of the New York and Tehuantepec stock, that will produce fifty thousand dollars. The engagement of the defendant was unconditional to deliver a certain amount of stock, &c. On April 25, 1866, the day the plaintiff sailed, he received from the defendant a letter, to the effect that he was happy that he had consented to leave for Mexico by the steamer, that the purchase of the grant for a railroad over the Isthmus of Tehuantepec had been completed, and he would send him papers at the earliest moment. The letter claimed

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Opinion of the Court, by SPENCER, J.

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to be a forgery does not materially change the terms of the engagement. It approves the proposition made to Mr. Wyckoff by the plaintiff, guaranteeing fifty thousand dollars in stock of the projected company. In one respect it is more unfavorable to the plaintiff: "I concur when the matter is complete." That is, when the imperial sanction to the proposed company has been obtained, I will complete my engagement, not before.

A power of attorney executed by the defendant, and dated May 9, 1866, reached him about the time of his arrival in Mexico. This, most likely, is one of the papers the defendant had promised, when the plaintiff sailed, "to send to him at the earliest moment." This power of attorney is in terms the same as the defendant had more than a month before its date executed to Wyckoff, when preparing to go upon the same mission. And it nowhere appears, as far as I can see, that the plaintiff had ever seen that power, or knew of the terms of the present one before reaching the ground of his operations. It is very difficult to understand why he should have been kept in ignorance of so valuable and serviceable a document, purporting to contain his instructions. Perhaps one versed in the dexterity and skill of diplomacy might furnish a satisfactory reason.

The defendant on July 26, 1866, wrote to the plaintiff, calling his attention to the power he had sent him, which authorized him to apply to the "imperial government, for their consent to change the name of the grant to the New York and Tehuantepec Railroad and Steamship Company." Although the letter speaks of the power, it is pointed to the changing of the name of the company. That was done by the decree of Maximilian.

This power of attorney which the plaintiff received in Mexico, gave broader powers than those contained in the contract entered into before the plaintiff left New



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York. It contained the additional authority, "to transfer the rights and powers, property, franchises, and charters of every name and nature of the said Louisiana and Tehuantepec Company, unto the new company."

The defendant now claims, that the plaintiff knew of this additional authority, and acted upon it in his negotiations with the imperial government; that a fair construction of the evidence on that point is, that the power contained all that he was required to do. That being so, he failed entirely to perform what was required of him, as shown by the decree he obtained; that the power contained the basis of the contract between the parties, and was so treated by them; that the contract being upon the contingency, that the privilege and franchises of the old company should be transferred to the new company, before the defendant became liable to pay either in money or stock; that those franchises and privileges being revoked, the company could not issue stock to the plaintiff or anybody else.

On this point, then, the parties were at issue as to what the evidence proved as matter of fact. By the defendant's theory, when the plaintiff found the power in Mexico clearly defining what was required of him to do, and he acted upon it, the agreement he had made before he sailed, was modified by his own voluntary act, and it can not be said he accomplished his mission.

I think that the court properly decided, that if this were true, it did not deprive the plaintiff of a suitable and proper compensation for his services. This, of course, is put upon the ground that he had performed his part of a valid contract before the defendant had imposed new and other duties by his letter of July 26, and the power. The question for the jury to answer in such a conflict of testimony was, whether the defendant,

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after the return of the plaintiff from Mexico, accepted the plaintiff's mission as a performance of the plaintiff's part of the agreement. This course was clearly justified by the pleadings. The complaint counted upon a *quantum meruit*, and the defendant, in his answer, does not deny that the plaintiff failed to perform, but that the defendant was *unable* to perform on his part. The jury having affirmatively answered the question submitted, and returning a general verdict for the plaintiff, it remains to look into some of the objections and exceptions taken on the trial, to see if the verdict can be sustained.

On the trial, after the plaintiff had stated that he had landed at Vera Cruz in the beginning of May, and went from there to Orizaba, where he fell sick and stayed six weeks, he was asked, "What expenses were you put to by your illness there?"

The question was objected to as irrelevant, immaterial, and incompetent. The court overruled the objection, and the defendant excepted. The witness then stated that he had two doctors most of the time, and one accompanied him to Mexico, and his expenses were something like six or seven hundred dollars in gold.

I am of the opinion that this testimony was clearly inadmissible. Under any aspect of the case was it proper? No obligation whatever obliged the defendant to pay the expenses of the plaintiff's sickness at Orizaba. And the answer was calculated to awaken the sympathies and arouse the prejudices of the jury. Plaintiff's counsel contend that the error was cured by the court directing the jury to disregard this testimony, and ordered it to be stricken out. But the testimony was given at the commencement of the trial, which lasted three or four days, and the order to disregard it and strike out was at the close, when the judge charged.

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Concurring opinion of SEDGWICK, J.

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The evidence had already had its effect upon the jury, and we can not say their judgments were not influenced. The cases of *Anderson v. The Rome, W. and O. R. R. Co.* (54 *N. Y.* 334), and *Erbon v. Lorrillard* (19 *N. Y.* 302), are clearly against the admission of this testimony.

I think, also, there was error in allowing the jury to take into consideration the subject of entertainments given by the plaintiff to Maximilian, to his cabinet, and to the empress. It is difficult to see how it was possible for the jury to consider those entertainments and disbursements in arriving at a verdict, when there were no items properly before them; no proof whatever of what they consisted or their value. I am of the opinion a new trial should be granted, with costs to abide the event.

SEDGWICK, J. (concurring).—I concur in the result, and am of opinion that the judgment should be reversed, with costs to abide event.

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Statement of the Case.

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THE TRUSTEES OF COLUMBIA COLLEGE IN  
THE CITY OF NEW YORK, PLAINTIFFS AND  
APPELLANTS, v. ANNA M. LYNCH, ET AL., DE-  
FENDANTS AND RESPONDENTS.

COVENANTS IN REGARD TO THE USE OF REAL ESTATE  
RUNNING WITH THE LAND.

PARTIES THERETO—THEIR POWER TO BIND SUBSEQUENT OWNERS,  
WHO TOOK TITLE SUBJECT TO IT.—RESTRAINT OF TRADE, BY  
SUCH COVENANTS, CONSIDERED.

A owning lands contiguous to B, entered into a written and sealed agreement with B, in which each party covenanted that thereafter no buildings but a certain class and kind of dwelling-houses should be erected on their respective lands described in said agreement, and neither they nor their heirs and assigns, nor their tenants, or sub-tenants, should permit, grant, erect, make, establish, or carry on in any manner, on any part of said lands, any stable, school-house, engine-house, tenement-house, or any kind of manufactory, trade or business whatsoever, or erect or build, or commence to erect or build, any building or edifice, with intent to use the same or any part thereof for any of such purposes, and that their covenants should bind their assignees and tenants, and the said lands should be forever subject thereto, and should run with the land, &c., &c.

After the death of A, his executor sold and conveyed the premises that belonged to A, and by several conveyances in regular succession, a portion of the same reached C, as owner, each of said conveyances being made subject to the original agreement between A and B.

C erected a building of a different style and character from the kind provided for in said agreement, a portion of which had an entrance and offices for business on another street than that contemplated by and covenanted in said agreement, and C's tenant occupied a portion of this building as a dwelling for himself and family, and another portion for an office in the real estate business, and his sub-tenants

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occupied other portions for other business, all of which was a violation and breach of the covenants of said agreement.

It appeared that this portion of the street (Sixth avenue) was wholly occupied, at the time of the commencement of the action, as a business street, while at the time of said agreement these premises were vacant lots. B brings an action to restrain C, and tenants, from carrying on business on their premises, because of the covenants in said agreement.

*Held*, That these covenants were binding upon C, but it appearing that A had not suffered any damage, and also that since the covenants had been made, there had been a change of the circumstances, condition, and business in this part of the city, and that the enforcement of the covenant against carrying on any business on the premises, would conflict with the public welfare and interests: a court of equity should not interfere. It is a well-established rule, that equity will not interpose between parties when a change of circumstances (in regard to the original status of the parties who made the covenant and the subject-matter thereof) renders it inequitable to do so.

Besides, the plaintiff should have interfered at the time the building was being erected, and not wait until the defendant had expended her money. "Every relaxation which the plaintiff has permitted, in allowing the house to be built in violation of the covenant, amounts *pro tanto* to a dispensation of the obligation, &c." (*Roper v. Williams*, 1 *Turner & Russel*, 22).

A court of equity can not disregard, but must take notice of, the changes that have taken place in certain portions of New York during the past fifteen years, in regard to trade and business; and all contracts which may obstruct the progress of the city, in trade, commerce, and population, should be strictly interpreted, and the equitable rights and interests of the individual must yield to the greater equities or interests of the masses, or the public.

Before SEDGWICK and SPEIR, JJ.

*Decided May 8, 1875.*

This is an appeal from a judgment of the special

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term dismissing the complaint. The cause was tried without a jury.

The action was brought to restrain the carrying on of business, in the premises on the north-east corner of Fiftieth street and Sixth avenue, in the city of New York, of which the defendant Lynch was owner, and the other defendants tenants, upon the ground that the premises were subject to a covenant reserving the property exclusively for dwelling houses.

The westerly portion of the block in question, prior to 1859, belonged to Joseph D. Beers, from whom defendant Lynch acquired title, and the portion adjoining on the east belonged to the plaintiffs.

On July 25, 1859, an agreement was executed by the parties, whereby the said Beers, in consideration of certain covenants therein contained on the part of the plaintiffs, did for himself, his heirs, and assigns, in respect to the lands which he then owned, covenant and agree to and with the plaintiffs, their successors and assigns, that his lands above mentioned, and every part thereof, should be subject to the following covenants among others, namely: that the said Beers, his heirs or assigns, his or their tenants, and others occupying his lands, above described, or any part thereof, should not permit, grant, erect, establish, or carry on in any manner, on any part of said lands, any stables, school-house, engine-house, or manufactory, or business whatsoever: or erect or build, or commence to erect or build, any building or edifice, with intent to use the same, or any part thereof, for any of the purposes aforesaid.

And it was mutually covenanted and agreed between the parties, that the grants, covenants, and agreements therein contained, should not only be binding upon the parties, their heirs, and successors, but that the same should run with the land, and be binding upon all persons, who might thereby become interested in the lands, or any part or parts thereof, as owners, tenants,

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or occupants, or otherwise claiming under, or through the said Beers, or as lessees of the plaintiffs, or as assignees, under tenants, occupants, or otherwise, under such lessees, and might be enforced by or against any of such persons as occasion might require.

The agreement was duly recorded, and the defendant Lynch took her lot expressly subject to the conditions and restrictions of the agreement of Beers and the plaintiffs.

Before the action was commenced, the defendant Lynch erected a four-story dwelling house upon that part of the premises conveyed to her, between Sixth avenue and a line distant twenty-two feet easterly therefrom, and running to the center of the block between Fiftieth and Fifty-first streets, of the full width thereof, fronting on, and entered by a high stoop from Fiftieth street, and in width, on Sixth avenue, sixty-four feet. On the basement story in front, by the side of the stoop, and on the side opening on Sixth avenue, were two French windows, and one on Fiftieth street, which were used as entrance doors to the basement and office.

The defendant Lynch was seized and possessed by herself, or her tenants, of that part of the premises improved by her, and the defendants Yates and Blaisdell are in the possession as her tenants.

The complaint alleges that the defendant Lynch has not complied with the covenants and restrictions contained in the agreement, but has violated the same, by erecting or building on the premises a certain building, with the intent that certain apartments on the ground floor should be used as shops or offices for the transaction of trade or business, and has permitted, and continues to permit, the violation of the covenants by the defendants Yates and Blaisdell.

That Yates has violated the said agreement, by carrying on, and continuing to carry on, the trade or

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Opinion of the Court, by SPEIR, J.

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business of a real estate and insurance agent, or broker, in part of the building erected as aforesaid.

That the said William A. and Harrison A. Blaisdell have also violated the said agreement, by carrying on, and continuing to carry on, the trade or business of house, sign, and fresco painters, in part of the building.

*G. D. L. Harrison*, attorney for appellants; *S. P. Nash*, of counsel.

*Townsend & Mahan*, attorneys for respondents; *H. L. Fancher*, of counsel.

BY THE COURT.—SPEIR, J.—The claim of the plaintiffs to equitable relief rests on the validity of the agreement entered into between the plaintiffs and Joseph D. Beers, relating to the manner of improving, for future use, the lots of land of which they were the adjoining owners. At the time of making the agreement, each party thereto owned the premises in fee, stated to be owned by them respectively; and neither party derived title by or through the other party. All the conveyances which carried the title from Beers to the defendant Lynch, were made subject to this agreement; and by each of the deeds it was expressly declared that the property was thereby conveyed subject to the covenants, conditions, and restrictions contained in the agreement.

The title to one of these lots next adjoining the Sixth avenue, and fronting on Fiftieth street, being the corner lot, passed by mesne conveyances to the defendant Lynch, and became vested in her. The plaintiffs at the time the agreement was made, were and still continue to be the owners in fee, of the several lots described therein, as belonging to and held by them.

There can be no doubt that the agreement, between Beers the grantor, and the plaintiffs, was upon a suf-



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ficient legal consideration and was valid in law. The intention of the parties in executing it is manifest. It was to prevent such a use of the premises by the owners, and those claiming under them, as might diminish their value or impair their eligibility as sites for private dwellings. Can there be any question that the courts would have enforced this agreement against Beers, had he committed a breach of his covenants by wholly disregarding its conditions and restrictions? He could not successfully set up that the obligation of the parties, in respect to mutuality, was not exactly equal, and that therefore he was not bound.

The agreement provides that its stipulation "shall not only be binding upon the parties hereto, their heirs and successors, but that the same shall *run with the land*, and be binding upon all persons who may hereafter become interested in the lands herein described, or any part or parts thereof, as owners, tenants, occupants, or otherwise, claiming under or through the said party of the second part."

The defendant Lynch took her title expressly subject to the "conditions and restrictions" in this agreement of Beers and the plaintiffs. It is quite likely had the contract been improperly obtained, the adequacy of the consideration would become important if either party had asked to have it rescinded. The parties who executed the indenture are bound by it, and I see no reason why such an agreement could not be binding in equity on the parties coming in as devisees or assignees with notice. It is mutual, for each proprietor was manifestly interested in securing the permanent value of his property, and in preserving the general respectability of the street, and the uniformity of the plan. The court can not enter into the question whether the consideration was equal in value to the restraint agreed upon by the parties. There are too many circumstances entering into such a calculation

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which can not be accurately ascertained, and which the parties are presumed to have fixed and settled (*Hitchcock v. Cooke*, 6 *Ad. & El.* 438).

The question, to what extent and in what cases are such stipulations binding on those who take the estate directly or by derivative title, is discussed in *Whitney v. Union Railway Company* (11 *Gray*, 359). The learned judge says, "the better opinion seems to be that such agreements are valid, and capable of being enforced in equity, against all those who take the estate with notice of them, though they may not be, strictly speaking, real covenants, so as to run with the land, or of a nature to create a technical qualification of the title conveyed by deed." It is not material that such stipulations should be binding at law, or that any privity of estate should exist between the parties, in order to render them obligating, and to warrant equitable relief in case of their infraction (*Western v. McDermot*, 1 *Vol. Law. Rep. Eq. cases* 499; *Whitman v. Gibson*, 9 *Sim.* 196; *Parker v. Nightengale*, 6 *Allen* 341).

Where the purchaser of the fee simple entered into restrictive covenants as to the user of lands, and afterwards granted a lease which did not contain any similar prohibitions, the lessee, though he had no actual notice of the covenants, was restrained, at the suit of the original vendor, from committing a breach (*Fielder v. Slater*, *L. R.* 7 *Eq.* 523).

The point is (the covenant before us being clearly of the nature that it might run with the land), whether the fact that it was made by Beers with a third person, the plaintiffs, prevents its attaching upon his own land against his grantees. The common law permits the transfer of covenants not by direct operation of an assignment, provided they are in their nature capable of running with the land. "The capacity of running with the land only exists when the covenant is about

or affecting the land, although not directly to be performed upon it, if it tends to increase or diminish its value in the hands of the owner" (1 Smith's leading cases, 225).

The courts in these cases clearly recognize the distinction between actions at law and in equity. In *Hurd v. Curtis* (19 *Pickering*) the covenant seems to have been treated as a purely personal one; and though it holds that an action at law will not lie as between subsequent owners of the land, the same court in Massachusetts has enforced similar covenants in equity (11 *Gray*, 359 and 6 *Allen*, 341, *supra*). In the late case of *Cole v. Hughes* (54 *N. Y.* 444) the action was to recover the value of a party wall built by one Dean, one half upon his lot and the other on that of one Voorhis. The latter had agreed that when he used the wall he would pay one half its costs; his successor used the wall, and the question was, whether he was liable, and it was held that he was not; that the covenant was a personal one, and did not run with the land. The learned judge says even if the defendant had purchased with constructive notice of the covenant, he did not become liable *in an action at law* upon the covenant. He cites the case of *Keppell v. Bailey* (2 *Myh. & K.* 517). Lord Collenham observes in *Tulk v. Moxhay* (2 *Phil. Rep.* 774, 11 *Beav.* 571): "If *Keppell v. Bailey* meant to lay down that the court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law, he (the chancellor) could only say he could not coincide with it." And in *Dart on Vendors and Purchasers*, 705, it is said, "nor will equity refuse to interfere, even though the covenant may be invalid at law as creating a perpetuity, or as being in unreasonable restraint of trade."

It would seem, therefore, upon authority, that in equity the question whether covenants run with land,

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or whether there be privity of estate, is of no importance. Nor can I see any reason why there should be. The doctrine rests upon the principle, that as in equity that which is agreed to be done shall be considered as performed, a purchaser of land, with notice of a right of interest in it subsisting in another, is liable, to the same extent and in the same manner, as the person from whom he made the purchase, and is bound to do that which his vendor had agreed to perform.

The important question is, therefore, did the defendant Lynch buy her lot subject to the covenants and restrictions in the agreement, in such a sense that her performance of them constituted an element of the consideration between her and her vendor. In the case of *De Mattos v. Gibson* (4 *De G. & J.* 276), the principle is clearly stated: "Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another, with knowledge of a previous contract, lawfully, and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose, in a special manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract, and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller (*Tulk v. Moxhay*, *Wilson v. Hunt*, *supra*).

Whether the mode of use is impressed upon the property by the plan of one owner, from whom all later grantees derive title, or by mutual covenants of two or more adjacent owners, the equitable obligation to perform the covenants must be the same in principle. The plaintiffs and Beers being adjoining owners of the several lots, entered into a mutual agreement, among other restrictions, to build dwelling-houses fronting on a certain street creating an easement, or open court yard by setting their houses back from the street line, being for their mutual benefit to secure them permanent

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value, their subsequent purchasers should be bound in equity to maintain the plan, whether at law one could be sued by another for damages or not.

There are covenants sometimes entered into by owners of land with the purchasers of other adjoining land, that the former shall not be built upon or planted, so as to impose other restrictions upon the mode of enjoyment of land in favor of persons taking no property in such land. Such a contract binds the land in view of a court of equity, where the court can properly interfere, as in case a person buys with notice of the covenant, although it may not run with the land, a specific performance of it will be enforced; or, what amounts to the same thing, the owner of the land will be enjoined from committing a breach of the covenant; and it is not open to the objection of creating a perpetuity (*Waterman v. Gibson*, 9 *Sim.* 196; *Man v. Stephens*, 15 *Sim.* 377; *Sugden on Vendors*, 266, *ed.* 1873).

The more important question, and one on which the plaintiffs' right to the relief asked for depends, relates to the extent of the covenant against carrying on any trade or business whatever, and whether the defendants are guilty of such a breach as would entitle the plaintiffs to damages.

By the record it appears that the tenant Yates lived in the basement of the dwelling-house with his family, having in one room thereof a real-estate office, and using it for that business, with a business sign; and that the other tenants occupied a room in said office for receiving orders for painting to be done by them, also with a business sign; and that no other trade or business was carried on in the building. That the entrance to this office was on Sixth avenue. Fifteen years ago, when the parties entered into the arrangement for providing for the future use and enjoyment of their several parcels of land, the improvements of the city by the erection of buildings had not extended as

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Opinion of the Court, by SPEIR, J.

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far in a northerly direction as Fiftieth street. This property and the surrounding neighborhood were known as, and called vacant lots. As the improvements in the city advanced on the cross-streets, they consisted chiefly, if not almost entirely, of dwelling-houses, and were held to be more valuable than buildings adapted to business purposes. The different trades and business of all kinds were confined to the more settled and populous parts of the city. The result was that real estate in the upper part of the city, improved by buildings adapted to business purposes, was less valuable than when improved by the erection of dwelling houses.

The rapid growth of the city, the improvement of its wide avenues by the comparatively easy mode of travel by the city railway, has wrought a great change not only in business locations, but in values. The Sixth avenue, among other great thoroughfares, has rapidly extended its trade and business quite beyond Fiftieth street, and is now well known as a business street. Not one of the plaintiffs' lots lie upon this avenue. The defendant Lynch has built her dwelling-house in full compliance with the restrictions imposed, by fronting on the cross-street, with the open court, thereby admitting more light and air, and adding to the attractive character of the street. It seems to me the aim and intent of the parties was to preserve these two cross-streets exclusively for residences. The whole force of the agreement is significant of that purpose. These streets were to be built upon with dwellings, at least three stories high, the material to be of brick, brown stone, or marble. After the house is finished and occupied, the complaint is made that it has been done with the intent to use apartments on the ground floor as shops or offices for business purposes. It must be assumed, in other respects at least, the covenants have been kept.

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Opinion of the Court, by SPEER, J.

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If the building had not been put up as required, it was the duty of the plaintiff to interfere at the time, and not wait until the defendant had expended her money. LORD ELDON says: "Every relaxation which the plaintiffs have permitted, in allowing the house to be built in violation of the covenant, amounts, *pro tanto*, to a dispensation of the obligation intended to be contracted by it" (*Roper v. Williams*, 1 *Turner & Russel R.* 22).

Even if it be maintained that the covenants apply to an exclusion of business on the avenue, or in any way regulate the style of the building on the avenue, otherwise than it should be a dwelling-house and fronting on the street, it is not plain that they have been broken. Offices occupied in the same way, in the basements of the street dwellings, as these are on the avenue, could not, I think, be said to be injurious or offensive to the neighborhood. They certainly are not, on a business street.

Whether this particular covenant be too broad to be upheld in a court of equity, it is enough to say that, such as it is, the breach is not sufficient, as appears from the case, to entitle the plaintiff to recover in an action at law, if one could be maintained.

It seems impossible to disregard the very different state of affairs which has taken place in the business relations in certain portions of the city of New York during fifteen years. Contracts which may obstruct its progress in trade, commerce, and population, should be strictly interpreted. It is the duty of the court to take notice of these changes. I am of the opinion that the plaintiffs should not prevail, for two reasons: *First*, Equity will not interfere if the plaintiffs have suffered no damage; and, *secondly*, it will not interpose when change of circumstances would render it inequitable to do so.

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Statement of the Case.

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The judgment must be affirmed, with costs.

SEDGWICK, J., concurred.

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AARON S. WILSON, PLAINTIFF, v. ADOLPH L.  
KING, DEFENDANT.

MALICIOUS PROSECUTION, AND FALSE IMPRISONMENT.

MALICE AND WANT OF PROBABLE CAUSE MUST BE PROVED TO SUSTAIN ACTION FOR.

It is well settled, that if malice had been expressly proven, that the action could not be maintained unless the plaintiff also established that there was no *probable cause for the arrest*. If it appears that the plaintiff was wholly innocent of the charge preferred, yet his action will be defeated, if defendant proves that he had reasonable grounds to believe that plaintiff was guilty at the time defendant made his complaint, and caused plaintiff's arrest (*Seibert v. Price*, 5 *Watts & Serg.* 438; *Munns v. Nemours*, 3 *Wash. C. C.* 37; *Foshay v. Ferguson*, 2 *Denio*, 617).

On the review of the facts in the case at bar, the court held that probable cause for the defendant's action was fully established, and justified the dismissal of the complaint.

The fact that the officer arrested plaintiff without a warrant, was no ground for sustaining the action. Although no felony had in fact been committed, the officer had reasonable grounds to believe that one had been committed, and acted in good faith and without evil design, and was, therefore, authorized to make the arrest without a warrant. The question of malice and probable cause, is one of law for the decision of the court, and not one of fact for the jury (*Burns v. Erben*, 40 *N. Y.* 463; *Masten v. Deyo*, 2 *Wend.* 426).

Before SEDGWICK and SPEIR, JJ.

*Decided May 3, 1875.*



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Statement of the Case.

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This cause comes before the court on exceptions ordered to be heard at general term in the first instance. It is an action to recover damages for an alleged malicious prosecution and false imprisonment.

The leading features of the case, as appears from the facts proven at the trial, were as follows :

The defendant was doing business as a warehouseman at No. 400 Washington street, in this city. Merrill & Tannerhill were the owners of a quantity of cotton in this store. They gave an order on the defendant for forty-five thousand pounds which they had sold to one Menelas. The plaintiff, as foreman of one Yetter, a carman, attended to receive the cotton. It was taken out of the warehouse and put upon the scales, and sampled, and the quantity called for was answered by one hundred and two bales, which were accepted by the purchaser's clerk, marked by him, and turned over to the plaintiff to cart away.

Upon weighing the cotton, ten or eleven bales had been rejected by the purchaser's clerk as not coming up to the standard. The bales that were accepted and marked were carted away, and subsequently two of the rejected bales were missed, and defendant, in looking for them, found them at Dillon's Cotton Press, where plaintiff had brought them. Defendant applied to a police officer, but made no complaint until the police officer instructed him to do so. The plaintiff was then brought before the officer, and upon hearing both sides of the story, the plaintiff admitted that he had taken the cotton, but excused himself by claiming that without those two bales, his quota of one hundred and two bales was short.

The plaintiff had acted as foreman in carting cotton for parties as owners, from defendant's warehouse, but it does not appear that the parties otherwise had any business relations with each other. The defendant

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Opinion of the Court, by SPEIR, J.

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having lost his property, was in search of it, and acted under the advice of the police officer.

*Abbett & Fuller*, attorneys and counsel for plaintiff.

*Nash & Holt*, attorneys for defendant; *S. P. Nash*, of counsel.

BY THE COURT.—SPEIR, J.—In order to sustain this action, it was necessary that the plaintiff must prove both malice and probable cause. I can see no proof of malice in the case. The defendant had lost his property, and all the evidence shows, that upon discovering his loss, he took such steps as any person would be expected to do to recover it. He discovered the two bales he had lost in Burling slip at Dillon's Cotton Press, with his marks upon them, identifying them as belonging to him. He first applied to the officer to ascertain if he could stop the cotton. He is told that he could not, unless there was a complaint made. This answer was according to the fact. The plaintiff showed that when cotton was once delivered at the cotton press by the carman, he, and no one else, had any further control over it. It goes in the course of business directly to the ship after it is pressed, and is considered as shipped when left at the press. It is a fair inference, that if the defendant could have stopped the cotton at this stage of the proceedings, he would have done so, and there would have been no necessity in making a complaint in order to regain it. Having applied to the captain of police to aid him in securing his cotton, he relied upon his judgment, and the next step to be taken was, who and where was the party who had taken it? In order to make the complaint, this was the only course left to be adopted.

The two bales had the defendant's marks upon

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Opinion of the Court, by SPEIR, J.

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them, which showed that they belonged to him; and whoever had taken them, must be some person who had carted the cotton. The plaintiff was the foreman of the carman and had receipted for it, and must be the responsible person if any one was. After the officer had heard the statements of both sides, the defendant makes the complaint, and the plaintiff is arrested. Now, in all this there is an entire failure of proof of malice. But it is well settled, that if malice had been expressly proven, the action could not be maintained without showing the absence of probable cause. Had the plaintiff been wholly innocent of the crime charged against him, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time he made his complaint (*Seibert v. Price*, 5 *Watts and Serg.* 438; *Munns v. Nemours*, 3 *Wash. C. C.* 37; *Foshay v. Ferguson*, 2 *Denio* 617).

There was abundant evidence for probable cause for the defendant's action to justify the dismissal of the complaint. The officer into whose hands the case had fallen, acted, I think, with wise discretion and judgment. Upon hearing both sides of the matter, he heard the admission of the plaintiff that he had taken the property, and the only excuse he had to give. He heard the defendant's statement, that it had been taken by the carman from his place without authority; and the defendant's identification of it. It is enough to say, without going into a particular examination of the evidence here, that the defendant had strong grounds for believing that the plaintiff had committed the offense. The case, therefore, comes within the definition of "probable cause." He had reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged.

The point is made by the plaintiff's counsel, that there was a want of probable cause in following up the

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prosecution of the plaintiff after his arrest. This objection is substantially answered in the preceding review of the facts, up to the time of the imprisonment. Nothing had taken place after the plaintiff's arrest and imprisonment which could well remove the defendant's belief in his guilt. No sufficient explanation of the circumstances were made which was calculated to remove the "probable cause." So far as it appears, no single fact had come to the knowledge of the officer or defendant, which tended to create a different opinion. Besides, the proceedings had acquired too much importance, to be governed or controlled by individual interest. A proper regard to the cause of public justice required, that the case should not be longer subject to the private action of the plaintiff.

There is no ground for sustaining the action because the officer arrested the plaintiff without a warrant. Although no felony has in fact been committed, if the officer had reasonable grounds to suspect that one has been committed, and acts in good faith, without evil design, he can make the arrest without warrant. The property was found in the possession of the plaintiff, who admitted taking it, without showing any right to do so. The court upon all the evidence in the case had the clear right, I think, to treat the question of malice and probable cause as one of law and not for the jury (*Burns v. Erben*, 40 *N. Y.* 463; *Masten v. Deyo*, 2 *Wend.* 426).

The defendant is entitled to judgment upon the exceptions.

SEDGWICK, J., concurred.

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Statement of the Case.

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WILLIAM SMITH, PLAINTIFF, v. CHARLES L.  
FROST, DEFENDANT.

RULINGS OF THE COURT ON THE TRIAL.

TESTIMONY RECEIVED MUST BE LIMITED IN ITS EFFECT AS PROVIDED BY SUCH RULINGS.

AMENDMENTS TO CONFORM PLEADINGS TO PROOFS, WHEN ALLOWED.

In this action, the form of the complaint was for the unlawful conversion of bonds of plaintiff by the defendant.

The proofs established that a right of action existed in favor of plaintiff, by reason of a promise of the defendant, and of the connection of the latter with the company who issued the same.

Plaintiff at the close of the trial moved to amend his complaint so as to conform it to his proofs. The court referred the plaintiff's application to the general term, and after directing a verdict for the plaintiff, ordered all the exceptions to be heard in the first instance at general term.

It appeared that all the testimony that established a cause of action in favor of plaintiff had been taken under the specific objections and exceptions of the *defendant* to all evidence of this class, *except only* so far as it would tend to show notice to defendant of the plaintiff's claim; and the court expressly ruled that it should be limited to that effect solely, and that was the clear and expressed understanding between the court and the counsel at the trial, and the trial was conducted and concluded upon that theory.

The general term held that under such circumstances the plaintiff should not be allowed to amend his complaint so as to conform the same to the proofs, for in such case the defendant would have judgment passed against him without a hearing upon the merits. He had a right, under his objections and exceptions, and the express rulings of the court, to consider that all this testimony was received, as applicable only to the cause of action stated in the complaint, it being limited by the court to the effect, the same would have to show notice to the defendant of the plaintiff's claim. This testimony was not received for the

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purpose of establishing a cause of action founded upon defendant's promise or contract.

*Held*, that the real issue between the parties had not been tried, and a new trial was ordered, with costs to the defendant to abide the event.

Before SEDGWICK and SPEIR, JJ.

*Decided May 8, 1875.*

The complaint is in form for a conversion of certain railroad bonds with their coupons. The court directed the jury to render a verdict for the plaintiff, and assess the damages at sixteen thousand four hundred and twenty-three dollars, and ordered the exceptions to be heard in the first instance at general term.

The plaintiff and James W. Smith, in 1857, being the owners of ten bonds of the Peoria and Oquawka Railroad Company, of one thousand dollars each, secured by the first mortgage upon the railroad, borrowed of one Benjamin F. Camp, and placed these bonds with him as collateral to the loan. In 1862, they repaid him the loan, and on calling for the bonds, they found that he had borrowed five thousand dollars upon them of the Union Mutual Insurance Company, and had pledged the bonds to that company. Camp, in the meantime, failed to pay his debt to the company and redeem the bonds, and the Peoria and Oquawka Railroad Company became embarrassed, and made default in their interest on these bonds. The bonds and mortgage contained a clause, that in case of default of interest for a certain time, the principal should be become due.

In December, 1862, the bond holders and other creditors entered into an agreement, for the foreclosure of the mortgage upon its road, and the reorganization of the company. In the plan for foreclosure, the defendant was one of the three trustees to purchase and reconvey the property to a new corporation organized for the purpose. As trustee, he was, "to receive all

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the bonds and coupons of the old company, and to purchase the road under the decree of foreclosure, for the benefit of all parties interested. A decree of foreclosure and sale was obtained November 23, 1863, and the road and property was sold March 21, 1864, and purchased by the defendant Edward Weston, and Henry L. Marquand, as commissioners, agents, and trustees of the plaintiff and other bond holders of the old company, and who associated under the plan of reorganization to form the Toledo, Peoria and Warsaw Railway Company, April 18, 1864.

The bond holders who elected to come in under the plan, were required to pay each his proportion of the amount bid for the property at the sale by the defendant and his associates, which was sixty-six dollars and sixty-six cents, on each one thousand dollar bond, and ten per cent. upon the amount of the bonds held by each person, for which a new bond of the new company was issued. In March, 1864, an arrangement was entered into that the Smiths should pay the assessment of sixty-six dollars and sixty-six cents, on each of the ten bonds of the old company belonging to them, which Camp had put temporarily out of their reach, and also the ten per cent. assessment upon the whole number of those bonds, and the new company should issue their new bonds, to which the holders were entitled, and place them in the hands of the defendant as trustee for the Smiths, and that the defendant should collect or receive the coupons and interest on those new bonds, and pay them over, deliver or account for them to the Smiths. This arrangement was to continue until they could get Camp to pay his note or should pay it themselves, if they could not make him do it, so as to get the old bonds from the Insurance Company where Camp had pledged them, and thus place the matter in such a condition that the new company could close it up and finally and defi-

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nitely deliver possession of the new bonds to the Smiths. Accordingly the Smiths, through the agency of the defendant, paid this percentage on the purchase, and the ten per cent. on their bonds, and thus became entitled to seventeen bonds of the new company. One of these bonds they received for the one thousand dollars, which they paid. The remaining sixteen were put into the hands of the defendant.

The defendant regularly paid the coupons and interest on these bonds to the Smiths, until and including December, 1869. The defendant was president of the new company from its organization. The bonds were entered in the books of that company as the property of the Smiths.

The insurance company continued to hold Camp's note, since March, 1858, and no interest had been paid on it since December, 1865, and repeatedly demanded payment of Camp. The defendant negotiated with the company to buy Camp's note, and the company had the note protested on March 4, 1870, and next day sold the bonds to defendant at private sale for five thousand dollars. This left one thousand four hundred dollars still due from Camp on the note. The plaintiff tendered to the defendant the amount he had paid the insurance company, with interest, and demanded the bonds. The defendant refused to surrender them.

The interest of James W. Smith was assigned to the plaintiff before suit. The suit was then brought. The only testimony given by the defendant was to show that the Smiths in January, 1866, took a mortgage from Camp on Westchester County bonds to secure themselves from loss by reason of Camp's having failed up to that time to redeem the bonds of the Smiths, which he had wrongfully pledged in 1858. The case was then submitted.

The defendant's counsel moved to dismiss the complaint, on the ground that no cause of action alleged in



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the complaint had been made out by proof. The plaintiff's counsel applied to conform the pleadings to the proof, if necessary. The court referred the plaintiff's application to the general term, and denied the defendant's motion, to which he excepted.

*Hammond & Stickney*, attorneys for plaintiff;  
*James Ennott*, of counsel.

*Marsh & Wallis*, attorneys for defendants; *Luther R. Marsh*, of counsel.

BY THE COURT.—SPEIR, J.—The defense set up on the trial was, that the proof did not conform to the complaint. The defendant's counsel at the close of the trial moved to dismiss the complaint, on the ground that no cause of action alleged in the complaint had been made out by the proof. It is not claimed that no cause of action had been shown.

The objections to evidence offered during the trial were not placed upon the ground that it was inadmissible under the complaint, but that it was immaterial.

The defendant's counsel claims that no evidence was given in this case relating to any right of action existing by reason of any alleged promise of the defendant, in regard to the bonds, or out of the defendant's connection with the railroad company, except such evidence as was admitted solely on the question of notice to the defendant of plaintiff's alleged ownership. And further, even if proof had been admitted generally, and not limited as he claims it was, yet the court would not, even if the evidence had made out a case, have permitted the plaintiff in the action for a tort, to have recovered on any promise or obligation growing out of the defendant's dealings with the plaintiff.

This brings us at once to the complaint and the proofs. Passing for the moment the technical question

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Opinion of the Court, by SPERR, J.

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of the form of the action, whether in tort or contract, the defendant would become liable equally to the plaintiff if the plaintiff was in fact the real owner of the sixteen first mortgage bonds of the Toledo and Warsaw Railway Company, with the coupons attached. If the defendant after proper demand unlawfully converted them to his own use, the plaintiff would be entitled to their value after proof of the same. If the defendant held them as plaintiff's agent, and refused to deliver them on application, he would be liable to the plaintiff in the same way and for the same amount. The allegation in the complaint that the defendant wrongfully possessed himself of the ten mortgage bonds of the Peoria and Oquawka Railroad Company, may be stricken out on motion, as redundant, when it appears.

Those bonds became discharged by the foreclosure of the mortgage, and I think it is plain enough the defendant acquired a perfect title to them by his purchase from the company. The company had good right to sell these bonds in open market, or at private sale, for whatever sum they saw fit. The pledgor, Camp, could only object to such a sale. Now while the defendant held these bonds lawfully, I think he treated them as belonging to the plaintiff, and became his agent to receive from him his percentage and assessment; and he received six hundred and sixty-six dollars and sixty-six cents to enable the plaintiff to participate in the new company, and undertook to recover from the new company the bonds, and hold them for the plaintiff. The defendant has not any title to the new bonds; he holds them for the plaintiff. If it became necessary to pay the insurance company to recover the old bonds from them, and surrender them to the new company, he, in paying that five thousand dollars as plaintiff's agent in the prosecution of his trust, and the only interest that he can have is to be reimbursed for the money he has paid out. This money has been tendered

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Opinion of the Court, by SPEER, J.

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to him. He simply surrendered ten of the old bonds, and obtained the issue of the new ones. Being coupon bonds, title is acquired by the party purchasing them.

Thus far, the facts have been stated, deduced from the evidence presented under exceptions taken on the trial, for the purpose of showing that the defendant acquired title to these bonds by the purchase he made of them. It is, however, proper to state that all the testimony taken, showing or tending to show, that a right of action exists by reason of any alleged promise of defendant, in regard to the bonds, or out of his connection with the railroad company, was taken under the specific objections of the defendant's counsel, and his exceptions to the ruling of the court admitting such testimony. The objections were, however, taken persistently at the out-set of the trial to all evidence of this class only so far as it would tend to show notice, and it was stated by the learned judge "that he would limit it to that." This was, as appears from the case, the clear understanding between the court and the defendant's counsel. Although it is quite apparent that the objection to this evidence was put upon the ground that it was not admissible in an action for conversion, yet the trial being conducted upon that theory to the end, should the court decide at general term that the pleading should be so amended to conform to the proof, the defendant would have judgment against him without being heard upon the merits, which he has a right to consider as secured to him by his objections and exceptions, and upon the limitations within which the testimony was restricted by the court. In this we think there was error. The result of the trial was, that a large amount of testimony was taken, which in view of the court made out a clear case for the plaintiff, and which up to the end of the trial was received, as the defendant had a right to suppose, as having no application to the question of the

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defendant's alleged promise in regard to these bonds, or out of his connection with the railroad company. The real issue between the parties has not been tried.

There should be a new trial, with costs to the defendant to abide the event.

SEDGWICK, J., concurred.

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PETER McQUADE, PLAINTIFF AND RESPONDENT,  
v. JESSE R. IRWIN, DEFENDANT AND APPELLANT.

PROMISSORY NOTE,—BONA FIDE HOLDER, &c.

The holder of a negotiable promissory note is entitled to protection against latent equities existing between the parties to the paper, when he became the holder, *only* when he has parted with something of value in money or property for the note, at the time he received the same; or he must have incurred some responsibility or liability, or parted with some right on the faith of the note (*Coddington v. Bay*, 20 *Johns*. 637, to the latest case of *Turner v. Treadway*, 53 *N. Y.* 650).

The case at bar, where the plaintiff received the note for an existing antecedent debt, does not fall within this well and long established rule.

Before SEDGWICK and SPEIR, JJ.

*Decided May 8, 1875.*

The action is on a promissory note described in the complaint.

The defense is want of consideration, the note having been given in settlement of an antecedent debt, and

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that the party who received it from the defendant fraudulently transferred it to the plaintiff.

The court directed the jury to find a verdict for the plaintiff for the amount of the note and interest, to which the defendant excepted. The defendant appeals from the judgment entered under the direction of the court.

*William T. B. Milliken*, for appellant.

*William P. S. Melvin*, for respondent.

BY THE COURT.—SPEIR, J.—The complaint alleges that the firm of Reford & Company after the endorsement of the note by the maker and by Reford & Company, delivered it to the plaintiff, who became the lawful holder and owner of the note; and when it became due and payable it was presented for payment, and payment refused. The answer denies that the defendant delivered the note to Reford & Company, but does not deny that they delivered it to the plaintiff after it was endorsed, and *before maturity*. It denies the plaintiff's ownership, and sets up that the maker delivered the note to Reford for the purpose of having it discounted; and that Reford promised and agreed with the maker to return it or the proceeds thereof to him, which he failed to do, but wrongfully converted it to his own use; that if it was transferred to the plaintiff, it was fraudulent and void, and was received by the plaintiff with full notice that the note was the property of the defendant.

The plaintiff testified that the note was received at its maturity from Mr. Reford, of the firm of Reford & Company, for merchandise sold and delivered by him to them; that the goods were sold from time to time; that it was an open account; that the goods were not delivered upon the note, but upon the personal

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credit of Reford & Company, who settled their account by giving the note, which covered just the amount of the bill.

The respondent's counsel contends that the facts show an absolute payment of an antecedent debt, and that the plaintiff, in taking the note as a security, must be looked upon as a *bona fide* purchaser for value. The general rule laid down seems to be this: that where negotiable paper is transferred for a valuable consideration, and without notice of any fraud, the right of the holder shall prevail against the true owner.

What is that *valuable consideration* in the rule, which shall protect the holder as against the maker of the note? Is this general rule satisfied, assuming, as counsel do, that this precedent debt has been paid by taking the note? The authorities, I think, abundantly show that is not the rule in this state. In the leading case of Coddington v. Bay (20 Johns. 637), it was held that the holder, to be protected against latent equities, must have parted with something of value at the time the note was received, in money or property; or must have incurred some responsibility or parted with some right on the faith of the note. The holder in this case has no superior equity, because his antecedent debt was paid by his taking the note, when he made no advances nor incurred any responsibility on the credit of the paper he received. His situation is not worse, if the note be not paid at maturity, than it was before he received it. He has lost nothing, parted with nothing of value, and assumed no responsibility.

As a matter of principle, the right to hold property in any case against the owner, is an exception to the general rule of law. Commercial paper obtained from the maker and owner, without notice of want of consideration and latent existing equities, is an exception to the general rule of law, and commercial policy only permits

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it. The reason of the rule is, that the innocent holder having sustained loss by giving credit to the paper, and paid a fair consideration, is entitled to protection. Paying an existing debt is certainly no valuable consideration. Had the plaintiff given to the party owing the debt such an obligation as would legally have discharged the debt, so that it could not be enforced, he would have parted with value, and the consideration would have been sufficient.

As it regards the indebtedness of Reford & Company to McQuade, his position was the same after as before he accepted the note. The note was valueless in the hands of his creditors, and remains so in his hands, because he gave nothing whatever for it. His right to prosecute this firm for his claim was not at all impaired. He comes into court claiming judgment against the maker, upon this note, with the endorsement of the parties, who, according to the evidence, have fraudulently appropriated it to their own use. I see nothing to prevent his recovering on this note against these endorsers.

The rule as laid down in *Coddington v. Bay* has been enforced in this state up to the latest case reported, of *Turner v. Treadway* (53 *N. Y.* 650); *Rosa v. Brotherson* (10 *Wend.* 85); *Young v. Lee* (2 *Kern.* 551); *Boyd v. Cummings* (17 *N. Y.* 101).

The judgment must be reversed, with costs.

SEDGWICK, J., concurred.

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Statement of the Case.

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ABRAHAM BALDWIN, ET AL., PLAINTIFFS AND  
RESPONDENTS, v. SAMUEL S. TALMADGE, DE-  
FENDANT AND APPELLANT.

SPECIFIC PERFORMANCE OF CONTRACT FOR THE SALE  
OF REAL ESTATE.

JURISDICTION OF SUPREME AND SUPERIOR COURT.

*Where the contract by its terms was to be performed in New York city, and the lands which were the subject of purchase in the contract, were situated in another State,*

The superior court, as a court of equity, has the same jurisdiction as the late court of chancery of this State, in actions to compel the specific performance of contracts for the purchase and sale of real estate, where the parties to the action have been brought within its jurisdiction by service of process or otherwise.

The late court of chancery exercised such a jurisdiction (see the cases cited in the points of counsel and the opinion of the court).

The provisions of the code are not applicable, when land which is the subject of the action lies out of the state (Newton v. Bronson, 13 N. Y. 587).

Before MONELL, Ch. J., CURTIS and SPEIR, JJ.

*Decided May 3, 1875.*

The action is brought to compel defendant to perform a certain agreement to purchase real estate, and to pay the purchase money therefor.

The complaint sets forth the terms of sale, the failure of defendant to comply, waiver of deed by defendant, and the refusal to pay the purchase money.

The answer sets up want of title to the property ; that the sale was fictitious ; that defendant's bid was for six lots laid out on a map as being one hundred and fifty-five feet on one side, and one hundred and fifty feet on



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the other; that he has tendered the amount of his bid to plaintiffs and refusal.

The case was tried by the court without a jury. The court found that the defendant should perform his contract, and gave judgment for the plaintiff. Defendant appeals.

The principal question in the case was, that of the jurisdiction of the court. The counsel's points on that subject are inserted.

*S. B. Bague*, attorney for appellant; *Charles H. Truax*, of counsel: I. The court has no jurisdiction of the subject matter of the action. The land is situated in the state of New Jersey; the contract was made in the state of New Jersey; the defendant resides in the state of New Jersey. It is admitted that the jurisdiction of this court is as full, ample, and complete as that of the supreme court. It is claimed that no case can be found where courts have made decrees affecting land, unless the land was within the jurisdiction, or some evidence of title; or the contract was made within the jurisdiction, or the parties to be affected were residents within the jurisdiction (*Ring v. McCoun*, 3 *Sand.* 524). The question in *Williams v. Fitzhugh* (37 *N. Y.* 444) was, will the courts of this state entertain a bill to declare void and compel the cancellation of a mortgage of land lying in another state, and executed there, in pursuance of a contract entered into in this state to secure loans made and payable in this state. The whole contract was entered into and to be performed in this state (p. 451). In *Newton v. Bronson* (13 *N. Y.* 587), the parties were residents of this state, and subject generally to the jurisdiction of its courts (p. 591). The judgment in *Gardner v. Ogden* (22 *N. Y.* 331), was that the defendants pay to the plaintiff fifteen thousand dollars, or, instead of paying that sum, Smith, one of the defendants, if he should elect so to do, might re-

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convey to the plaintiff such portions of the lots as he had not sold, and the court of appeals affirmed this judgment. All the parties in *Bailey v. Ryder* (10 *N. Y.* 363), lived in this state, and the court held that they had power to compel a judgment debtor to convey to a receiver lands situate in another state for the benefit of his creditors. The case of *Dale et al. v. Roosevelt* (5 *Johns. Ch.*, 174), does not touch the question. In that case, the executors of Robert Fulton prayed for an injunction to stay a suit at law upon a contract entered into by said Fulton to buy certain lands in Ohio. It does not appear where the contract was made, or in what state the action on it was brought; but the fact is, that both Fulton and Roosevelt were inhabitants of this state, and probably the action at law was brought in this state, and the contract made here. Nothing was said by the chancellor (KENT) as to jurisdiction; this case is not an authority on that point. *Ward v. Arredondo* holds that jurisdiction may be upheld whenever the parties or the subject, or such a portion of the subject, are within the jurisdiction, that an effectual decree can be made and enforced so as to do justice. The facts of the case are these:—The plaintiff, a citizen of New York, had entered into a contract with the defendants in Havana for the purchase of a large tract of land in Florida, and had paid a large amount on account of said contract; the defendants had transmitted to the defendant Thomas, at the city of New York, a deed executed by them, with instructions to Thomas not to deliver it unless he was paid a further sum, and, if he was not paid that sum, to return the deed. The plaintiff prayed, amongst other things, that Thomas be restrained from sending the deed out of jurisdiction; Chancellor WALWORTH held that the deed was subject to the jurisdiction of the court, but said that his opinion was to be considered a provisional one, and as

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applicable to the state of the question as represented on a motion to dissolve the injunction, in which some weight may be allowed to the circumstance that a dissolution of the injunction would, in effect, be final. In the case of *Mead v. Merritt* (2 *Paige Ch.* 402), the same chancellor held that where a party is within the jurisdiction of the court of chancery, so that on a bill properly filed here this court has jurisdiction of the person, although the subject-matter may be situated elsewhere, it may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this state or in any foreign jurisdiction. And (this is *obiter*) it may in the same manner compel him to execute a conveyance or release of property in another county. But he dissolved the injunction which had been issued restraining the defendants from prosecuting their action in court. *Mitchell v. Bunch* (2 *Paige Ch.* 606) was an application to discharge a *ne exeat*. Chancellor WALWORTH said that it was not necessary to inquire whether under the 39th section of the title of the revised statutes, which relates particularly to this court and its proceedings, real property out of the jurisdiction of the court can be applied in satisfaction of the complainant's judgment. He further said that, independent of the statute, this was a case in which a court had jurisdiction to compel a debtor, whose body is exempt from execution at law, to discover his property, so that it may be applied in satisfaction of his just debts. Whether the defendant has any part of his property vested in lands, &c., can not be ascertained until the coming in of the answer. It will then be time to raise the objection that this court can not make a decree concerning real estate which is situate in a foreign country. In *Sutphen v. Fowler* (9 *Paige Ch.* 280), the same chancellor held that the court of chancery had jurisdiction to decree the specific performance of a con-

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tract for the sale of lands situate in another state where the defendant is within reach of its process. In that case the defendant was domiciled within the state, and it is fair to infer from the statement of facts that the contract was made here. In *Shattuck v. Cassidy* (3 *Edw. Ch.* 152) the contract was made here, and the defendant had voluntarily submitted to the jurisdiction of the court, and came within the jurisdiction voluntarily to be served with process. The cause of action in *De Klyn v. Watkins* (3 *Sandf. Ch.* 185), arose in this state; all of the defendants were served in the state; all of the defendants except one, resided in the state, and part of the land was within the state. In the late case of *Morris v. Chambers* (29 *Beavan*, 253), a suit to enforce a personal demand on property in a foreign country, both parties residing in England, and the defendants had been served in England, LORD ROMILY said, "that the bare statement of such a proposition requires that some special state of circumstances should exist in order to enable the court to give any relief of this description." He did not pass upon the single point at issue in this case, but decided against the plaintiff on other grounds. In the later case of *Cookney v. Anderson* (31 *Beavan*, 452), the question of the jurisdiction of the court of chancery was fairly before the court. LORD ROMILY said, "that if it were not for the question of jurisdiction, on proof of the allegations of the bill, he would not have hesitated to have made a decree in accordance with the prayer." "That the principles which govern the jurisdiction of the court is analogous to that of the civil law; that these consist of three circumstances, any one of which will give jurisdiction; the first is where the domicile of the defendant is within the county; the second, where the subject-matter in dispute is within the jurisdiction; and the third, where the contract in question was entered into within this jurisdiction;" and he defines

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jurisdiction to be "the topographical limits within which the compulsory process of the court operates to compel obedience to its decrees and orders." He further said, "that if he should give plaintiff a decree, the only way in which it could be enforced would be to proceed in Scotland—where the land was—as in a case of a foreign judgment." He said, "that he could find no case which would maintain such an exercise of the jurisdiction of the court; and sustained the demurrer to the jurisdiction." The case was affirmed by the lord chancellor (see *Cooking v. Anderson*, 1 *De G. Jones & Smith*, 365; *Huenermund v. The Erie Railroad Company*, *Daily Register*, October 27, 1874).

*Isaac L. Miller*, attorney for respondents:—I. In the estimation of plaintiff's counsel, the main if not the only question to be determined on this appeal is: Has this court jurisdiction of this action? In connection with that proposition of law, certain undisputed facts are to be considered, viz.: that defendant signed a certain agreement, which by its terms was to be performed in New York city; that defendant was served with a summons in this action, and that he transacts business in New York city; that two of the plaintiffs reside in and four of them do business in this city. Starting with these facts, the following authorities are submitted as to jurisdiction. The doctrine is that the court having jurisdiction of the person of the defendant will, by its process of injunction and attachment, compel him to do justice, by the execution of such conveyance as will affect the title of the property in the jurisdiction within which it is situated (*Newton v. Bronson*, 3 *Kernan*, 587; see 3 *Abb. Pr.* 20, note). It is perfectly well settled that the supreme court has jurisdiction to decree the specific performance of a contract for the purchase of lands lying in another state. Such a jurisdiction existed in the court of chancery and passed to the

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supreme court by the provisions of the present constitution (*Massie v. Watts*, 6 *Cranch*, 148; *Shattuck v. Cassidy*, 3 *Edw. C. R.* 152; *Ward v. Arrando*, 1 *Hopk. C. R.* 213; *Mead v. Merritt*, 2 *Paige*, 402; *Mitchel v. Bunch*, 2 *Id.* 606; *Sutphen v. Fowler*, 9 *Id.* 280; *Gardener v. Ogden*, 22 *N. Y.* 327; *Bailey v. Ryder*, 10 *Id.* 363; *Fenner v. Sanborn*, 37 *Barb.* 610; *Cleveland v. Burrill*, 25 *Id.* 532; *Myers v. De Mier*, 4 *Daly*, 343). By the act of 1873 (Laws of 1873), chap. 239, the superior court, and each of the judges thereof, "has henceforth in court and out of court, power, authority and jurisdiction, co-extensive and concurrent with that of a justice of the supreme court, in court or out of court, as the case may be, in all actions and special proceedings of a civil nature, except those pending in the supreme court."

BY THE COURT.—SPEIR, J.—The learned judge has found all the issues of fact, made by the pleadings in favor of the plaintiffs; and it is quite clear that the evidence fully justifies his conclusions.

The question principally discussed by the counsel, is whether the court has jurisdiction of the subject-matter of the action. The land was situated in New Jersey; the contract was made in New Jersey; the defendant resides in the state of New Jersey. The contract was to be performed in the city of New York. Counsel for the appellant concedes that this court has as full and complete jurisdiction as that of the supreme court. This jurisdiction, moreover, is established by the act of 1873, chapter 239.

It will not be denied but that such a jurisdiction existed in the late court of chancery, nor that the same passed to the supreme court by the provisions of the present constitution. In this respect the jurisdiction of this court can not be questioned. That concession could not be avoided consistently with a settled course

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Opinion of the Court, by SPEIR, J.

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of adjudications. The appellant's counsel claims that the courts have never made decrees affecting land, unless the land was within the jurisdiction, or some evidence of title, or the contract was made within the jurisdiction, or the parties to be affected were residents within the jurisdiction.

A court of equity has uniformly decreed the performance of the sale of lands lying in another state, where the party who is to make the conveyance is within the jurisdiction of the court, and has been served with process, and is therefore competent to make a decree respecting the delivery of the deed according to the contract of sale, to be enforced by process *in personam* (*Shuttrick v. Cassidy*, 3 *Edw. Ch. R.* 152; *Sutphen v. Fowler*, 9 *Paige*, 280).

It also has power to compel a judgment debtor residing out of the state, after obtaining jurisdiction by process, to execute a conveyance of lands in another state for the benefit of creditors (*Bailey v. Rider*, 10 *N. Y.* 363).

It is enough to say that the provisions of the code are not applicable, when land which is the subject of the action lies out of the state (*Newton v. Bronson*, 13 *N. Y.* 587).

The judgment should be affirmed, with costs.

MONELL, Ch. J., and CURTIS, J., concurred.

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IGNACIO F. ALFARO, PLAINTIFF AND APPELLANT,  
v. STRATFORD P. DAVIDSON, DEFENDANT  
AND RESPONDENT.

ENTRY OF JUDGMENT—STAYING SAME.

Has the court the power to suspend the entry of judgment, after a trial and verdict, except in the cases named in § 265 of the code? *Held*, That the court has the necessary control over its judgments, and that in the exercise of a sound discretion, it may suspend, vacate or amend them. This power is incidental, and necessary to the orderly and equitable administration of justice.

Before MONELL, Ch. J., and SPEIR, J.

*Decided May 3, 1875.*

Plaintiff obtained a verdict for five hundred dollars. Defendant moved for a new trial on judge's minutes. The motion was denied; a stay of all further proceedings on the verdict was granted for thirty days. Defendant appealed to the general term from the order denying motion for a new trial. The defendant then moved on affidavits for an order to stay proceedings on verdict, until decision be had by the general term on the appeal.

An order was made at special term, staying proceedings on defendant depositing eight hundred and fifty dollars in United States Trust Company, to the credit of the act to abide decision on the appeal.

The plaintiff appeals from the order.

*Coudert Brothers*, for appellant.

*S. F. & F. H. Cowdrey*, for respondent.

By THE COURT.—SPEIR, J.—The appellant objects to the order upon the ground that the court had no power



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Opinion of the Court, by SPEER, J.

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to suspend the entry of judgment. That in only two cases does the law invest the court with that privilege, viz. : Where exceptions are ordered to be heard in the first instance at the general term ; and where a verdict is directed, subject to the opinion of the court at general term, under the 265th section of the code of procedure.

The case of *Cobb v. Cornish* (16 N. Y. 604) is relied on as recognizing this limitation. I do not so understand that decision. What that case decides is, that the proceedings upon a trial at circuit are reviewable, in the first instance, at general term, in only two cases : *First*, upon a motion by the unsuccessful party for a new trial, upon exceptions, by the order of the judge who tried the cause. *Second*, when there is an uncontradicted state of facts, and the case presents only questions of law, and the judge directs a verdict subject to the opinion of the court. The question of power in suspending the entry of a judgment in any case is not discussed. The plaintiff in the case had a verdict which the judge directed to be taken, subject to the opinion of the court at general term ; and the court at general term rendered judgment for defendant. The court of appeals reversed the judgment as for a mis-trial and granted a new trial, though the judgment appeared from the case to be correct upon the merits.

Chief Justice Oakley, in *Bacon v. Reading* (1 Duer, 622) on an application to set aside a judgment for irregularity, which had been entered (in a similar case), after the time staying all further proceedings on the verdict had expired, refused upon the ground that the judgment was entirely regular. It is quite evident from the logical deductions of the learned judge, had the judgment been irregularly entered it would have been set aside, and the entry suspended.

All the case in *Devoe v. Hackley* (in 3 Robt. 679) decides is that the 265th section of the code confines the

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Opinion of the Court, by SPEIR, J.

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power of the judge who tried the cause over the disposition of the exceptions, and judgment to *the time of the trial*. After that, he has no more power to make an order in the case *as to the hearing of the cause*, than any other judge.

I am not aware, that it has ever before been held that the court has not the necessary control, under the exercise of a sound discretion, over its judgments in suspending the entry of them, vacating or amending them. The power is incidental, and necessary to the orderly equitable administration of justice.

The order appealed from should be affirmed, with costs.

MONELL, Ch. J., concurred.

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Opinion of the Court, by SPEIR, J.

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KATE HISSONG, BY HER GUARDIAN, PETER  
HISSONG, PLAINTIFF AND RESPONDENT, v. WIL-  
LIAM HART, DEFENDANT AND PLAINT.

**EXONERETUR OF BAIL.**

Application for, too late after the bail had become charged. The return of the sheriff can not be questioned in an action against bail, and, therefore, can not be questioned on a motion to discharge the bail.

Before MONELL, CH. J., and SPEIR, J.

*Decided May 8, 1875.*

This is an application by the bail of the defendant for an order exonerating them from liability.

*Lansing & Lambrecht*, counsel for bail.

*W. H. & D. M. Van Cott*, counsel for plaintiff.

BY THE COURT.—SPEIR, J.—Judgment was recovered November 21, 1873, against the defendant, and an execution against the defendant was issued October 9, 1874, to the sheriff, which by section 290 of the code is returnable in sixty days. The bail surrendered the defendant to the sheriff, January 11, 1875, more than a month after the return day of the execution, and the defendant, on the 15th of said January, gave bail to the sheriff for the limits, and on the 20th of January the sheriff returned the execution “defendant not found.” January 22, 1875, the plaintiff sued the bail, who now apply for an exoneration.

This case has been decided by the special term on two occasions on substantially the same facts, and has

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Concurring opinion of MONELL, Ch. J.

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been fully examined by two of the learned judges of this court. I fully concur in their conclusions, and am in favor of affirming the order, with costs.

MONELL, Ch. J. (concurring).—The return of the sheriff, "not found," authorized the action against the bail; and it was too late to apply for an *exoneretur* after the bail had become charged (*Code* § 188). It seems the return of the sheriff can not be questioned in the action against the bail (*Cozine v. Walter*, 55 *N. Y.* 304). It, therefore, can not be, in a motion to discharge the bail. The remedy is by action against the sheriff for a false return.

I concur in affirming the order, with costs.

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CASES ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK

AT GENERAL TERM.

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JAMES PATTERSON, PLAINTIFF AND RESPONDENT,  
v. CHARLES STETTAUER, AND OTHERS, DE-  
FENDANTS AND APPELLANTS.

REFERENCE—COMPULSORY.

I. MOTION FOR, WHAT NOT AN ANSWER TO.

a. *Fraud*—the fact that the *answer* presents a question of fraud for trial, is not a sufficient answer.

b. *Difficult questions of law involved.*

1. An *affidavit* made by the attorney and counsel of the party opposing the motion, *stating generally* that difficult questions of law are involved, is not sufficient.

1. The questions of law expected to arise must be *pointed out specifically*, and in such manner as to *enable the court to determine* whether they are of any real difficulty.

Before MONELL, Ch. J., and FREEDMAN, J.

*Decided June 7, 1875.*

Appeal from an order of reference.

The action was for the sale and delivery under a

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Statement of the Case.

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special contract "of as many pounds of fresh beef, net weight on the block, as may be called for by the government commissary." The contract fixed the price per pound, and the terms and manner of payment.

The complaint alleged the delivery between February, 1868, and May, 1868, of six hundred and forty-seven thousand five hundred and seventy-eight pounds, and claimed to recover a balance of seventeen thousand three hundred dollars and nine cents.

The answer of the defendants denied and put in issue the number of pounds of beef alleged to have been delivered.

And for a further defense it alleged in bar, "that after the delivery by the plaintiff to the defendants of all the beef ever delivered by him under the contract set forth in the complaint, and after the plaintiff had drawn all the drafts which he ever did draw upon C. S. Stettauer & Co., for or on account of the beef, or payment of the beef delivered by him under the said contract, and after all the said drafts were past due, and when the plaintiff was entitled, if ever he was entitled to commence this action, and to recover of the defendants upon and for the cause of action set forth in the complaint, and on or about April 29, 1870, the plaintiff commenced an action in this court against the defendants upon and for a part of the same cause of action, that is to say, to recover of these defendants the sum of eleven thousand six hundred and forty dollars and twenty-five cents, being the aggregate amount of five drafts alleged in the complaint in that action to have been drawn by him upon C. S. Stettauer & Company, at twenty days sight, in payment of beef delivered by the plaintiff under the said contract, and in conformity therewith, and endorsed as correct by the commissary agent named in the said contract, and presented for acceptance and payment to them, and which they

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Opinion of the Court, by MONELL, Ch. J.

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had refused to pay ; that these defendants appeared and defended the said action, and the same was pending when this action was commenced, and that such proceedings were had therein ; that after this action was commenced, and on October 21, 1874, judgment was recovered and entered therein, in favor of the plaintiff and against the defendants, upon and in conformity with the report of a referee to whom the same was referred for trial and determination, for the sum of five thousand and ninety-nine dollars and seventy-nine cents damages, and nine hundred and eighteen dollars and eighty cents costs, being the amount of one of the last named drafts, which was dated May 1, 1868, and was for the sum of three thousand five hundred and five dollars and ninety-five cents and interest thereon, the said referee having in his report therein, decided and determined that the plaintiff was not entitled to recover against the defendants, for or on account of the four other drafts set forth in the complaint in that action, and amounting in the aggregate to eight thousand one hundred and thirty-four dollars, and being all dated April 23, 1868."

The separate items of delivery numbered upwards of sixty.

The plaintiff moved for the reference upon the pleadings, and an affidavit that the trial would require the examination of a long account.

The defendants insisted that difficult questions of law would arise, and that there was a question of fraud raised by the answer.

The motion to refer was granted, and the defendants appealed.

*A. R. Dyett*, for appellant.

*Elihu Root*, for respondents.

BY THE COURT.—MONELL, Ch. J.—The objection

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Opinion of the Court, by MONELL, Ch. J.

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that the defendant's answer presents a question of fraud, is disposed of by *Welsh v. Darragh* (52 N. Y. 590). It is there held, that if the plaintiff's cause of action is referable, it can not be made non-referable by the defendant's answer.

The only remaining objection is, that difficult questions of law will arise, which under the exception in the code, renders the action non-referable (*Code* § 271).

The court can not in any case direct a reference, "where the investigation will require the decision of difficult questions of law;" but the party alleging that such questions will arise, must present the points of difficulty clearly and distinctly; for the court must be satisfied that they are questions of real difficulty. And it is not enough that the party or his attorney or counsel allege it generally (*Anonymous*, 5 Cow. 423; *Shaw v. Ayres*, 4 *Id.* 52; *Lusher v. Walton*, 1 *Caines*, 149; *Salisbury v. Scott*, 6 *John.* 329).

The defendants have not complied with these requirements; and we can not determine, from the affidavit of their counsel, what questions of law he claims will arise. After stating the proceedings in, and the trial, of another action between the same parties, in which certain questions of law were discussed and decided, he says: "On the trial of this action important questions of law will arise in addition to the important and difficult questions of law which arose upon the said reference, and which were argued, according to my present recollection, for nearly two entire days before the referee, in addition to voluminous briefs submitted by both parties; and other questions of law will arise upon the trial of this action upon the defense set forth in the answers of the defendants in this action, as by reference thereto will more fully appear."

I do not think we are required to carefully examine the pleadings to see what, if any, questions of law, difficult or otherwise, may be raised upon the defense



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set up. Such questions, if they exist, should be pointed out, that we may see what the party relies on, and whether they are of any real difficulty.

As sole referees are now almost invariably members of the legal profession, they are, perhaps, as competent to determine even difficult questions of law, as the court. Besides, the ample remedy by appeal to correct errors is another and a sufficient protection.

I am of opinion the order should be affirmed, with costs.

FREEDMAN, J., concurred.

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MARY E. MARYOTT, PLAINTIFF AND APPELLANT,  
v. BENJAMIN C. THAYER, DEFENDANT AND  
RESPONDENT.

REFERENCE—COMPULSORY—OF ALL THE ISSUES.

I. ANSWER, MAY BE FOUNDED ON AVERMENTS CONTAINED IN.

a. *In an action on contract where the answer sets up an affirmative defense or defenses, by way of counter-claim or otherwise, involving the examination of a long account, all the issues are referable,*

*Although*

*the cause of action set forth in the complaint is non-referable.*

Before MONELL, Ch. J., FREEDMAN and SEDGWICK, JJ.

*Decided June 7, 1875.*

Appeal from an order of reference.

The action was to recover a sum of money received by the defendant to the plaintiff's use.

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Opinion of the Court, by MONELL, Ch. J.

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The complaint alleged the recovery of a judgment in an action in which the defendant, an attorney at law, was the plaintiff's attorney; an assignment of the judgment to the plaintiff in this action, and the collection of it by the defendant.

The defendant, as separate defenses or counter-claims, or set-offs, alleged the advancing and paying out of money, and the performing of labor and services, aggregating a large number of items.

Upon the pleadings, and an affidavit that the trial will require the examination of these numerous items, a motion was made to refer the trial of the action.

The plaintiff did not deny that the items constituting the alleged counter-claim or set-off were numerous.

The motion was granted, and the plaintiff appealed.

*Albert Stickney*, for appellant.

*B. C. Thayer*, in person, for respondent.

BY THE COURT.—MONELL, Ch. J.—Among the cases where the court is authorized to direct a reference is "where the trial of an issue of fact shall require the examination of a long account on either side" (*Code*, § 271, *sub.* 1). Under this provision it was held, in some cases, that the court could refer *all the issues*, if any one of them required the examination of a long account, notwithstanding that as to such other issues the parties had an absolute right of trial by jury (see *Whittaker v. De Fosse*, 7 *Bosw.* 678; *Batchelor v. Albany City Insurance Company*, 1 *Sweeny*, 346). But recent decisions of this court have somewhat restricted the power and confined it to cases where *all* the causes of action set forth in the complaint were referable. Thus in *Evans v. Kalbfleish* (36 *Superior Ct.* 45), one cause

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Opinion of the Court, by MONELL, Ch. J.

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of action was on a special contract, which did not involve the examination of any account. A second cause of action was for work, labor, and services, the trial of which would require the examination of a long account. It was held the whole *action* could not be referred. A similar decision was made in *Ross v. Combes* (37 *Superior Ct.* 289).

These decisions conflict with the former adjudications only in respect to the power of the court to refer all the issues when some only are referable. But they do not affect the question involved in this appeal.

The plaintiff's only cause of action is upon contract. Its trial will not require the examination of any account. It is, therefore, not referable.

But the defendant has interposed a counter-claim or set-off, embracing a large number of items, which will require to be examined on the trial.

We are concluded by the decision of the special term, that the trial will require the examination of a long account, within the meaning of the code (*Ronalds v. Mechanics' National Bank*, 37 *Superior Ct.* 208; *Hossack v. Heyerdahl*, 38 *Id.* 391), leaving the only question, whether the court can direct a reference of *all* the issues, when only those presented by the defendant's counter-claim or set-off are referable. Very nearly this precise question was presented in *Kain v. Delano* (11 *Abb. N. S.* 29). The plaintiff's cause of action was a single item. The answer alleged a counter-claim, which, the plaintiff's moving affidavit averred, would require the examination of a long account. The court of appeals reversed the order directing a reference of the whole action, on the ground that the proof before the court below was insufficient to show that a long account would be required to be examined. But the power to refer in such a case is, I think, fully recognized by the court. They say (p. 36), "The defendants do not allege or set up any counter-

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Opinion of the Court, by MONELL, Ch. J.

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claim, or any defense, resting upon or calling for the examination of an account between the parties to the action. As *new matter*, there is set up by way of defense a *single* transaction."

There is a *dictum* in *Welsh v. Darragh* (52 N. Y. 590, 592), which determines the referability of an action by the complaint; and that if the plaintiff's cause of action is on *contract*, the answer of the defendant can not make it non-referable, although it may set up a recoupment or counter-claim, of which by itself he would have the right of trial by jury.

To allow a reference of an entire action, where the only referable issue is upon an independent cause of action set up by a defendant as a counter-claim, would seem to effectually deprive a plaintiff of the right of trying *his* cause of action by jury. A right which was recognized and enforced in *Townsend v. Hendricks* (40 How. Pr. 143).

But, perhaps, the code can not be differently construed. It says an account "*on either side*," which is broad enough to allow of a reference of the defendant's issues, when the plaintiff's action is upon contract, although in itself not referable.

Until the court of appeals recedes from what we think is decided in *Kain v. Delano* (*supra*), we must adopt that as the law.

The order must be affirmed, with costs.

FREEDMAN and SEDGWICK, JJ., concurred.

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Statement of the Case.

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MICHAEL L. DOYLE, ET AL., PLAINTIFFS AND APPELLANTS, v. SAMUEL LORD, ET AL., DEFENDANTS AND RESPONDENTS.

LESSOR AND LESSEE.

I. WINDOWS—LIGHT AND AIR.

a. *Right of lessee and lessor in respect of.*

1. Where a building having windows overlooking vacant premises owned by the lessor is demised, "*with the appurtenances*," by a lease containing only a covenant for quiet enjoyment, *the lessee acquires no right* as against the lessor, or those claiming under him, to have the windows remain unobstructed for the passage of light and air, or any other purpose.

1. Such a right does not pass under the clause, "*with the appurtenances*."

1. This, although the vacant premises are situate in the rear of the building and have erected on them a privy (constituting what is ordinarily termed a yard), it appearing that the lessee had no right to the use of the privy, nor of access thereto.

1. Consequently the lessor, or those claiming under him, are at liberty to place an erection on such vacant premises, although the effect is to entirely obstruct the windows of the demised house which overlooks the vacant premises.

b. *What facts do not affect these rights.*

These rights are not affected by the facts :

That the lessor had covenanted to put iron bars in the windows; had for a valuable consideration granted to an adjoining owner the privilege to put windows in his building looking into the rear premises, and had covenanted not to obstruct such windows; that the lessee was restricted by the demise to him, to using the demised premises for a particular business, for which business the light from the windows was highly desirable and beneficial, the sales largely depending on it; that the lessor had subsequently leased the vacant premises to the party who was putting up the erection complained of, making such subsequent lease subject to the prior one, and providing in the subse-

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Statement of the Case.

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quent lease that the lessee therein should not interfere with the lessee in the prior lease, in the occupation of the premises thereby demised.

**ANCIENT LIGHTS.**

I. *English doctrine of, does not obtain in the State of New York.*

Before MONELL, Ch. J., CURTIS, and SPEIR, JJ.

*Decided June 7, 1875.*

Appeal from a judgment.

In July, 1870, Ann Gillett (the owner) leased to the plaintiff "all that store on the *first floor*, known as No. 85 Forsyth street, in the city of New York, to be occupied by them as a dry goods store, *with the appurtenances*, for the term of five years from May 1, 1871." The lease contains a covenant of peaceable and quiet enjoyment.

The width of the store was twenty-five feet, and its depth fifty-one feet. There was an open space in the rear nineteen feet deep and of the width of the store. Under some parol agreement between the lessor and the plaintiffs, the lessor, before executing the lease caused a door and part of the windows in the rear wall of the store, and opening or looking upon the afore-said space, to be closed, except leaving a space of about two feet in the upper part of the windows, which the plaintiffs barred with iron bars, leaving no means of access from the store to the space in the rear; but the upper part of the windows furnished light to the rear of the store.

The open space in the rear of the store was part of a lot or space of nineteen feet wide and fifty feet deep, extending across the rear of the plaintiff's lot and the lot adjoining on Forsyth street, and was also owned by Mrs. Gillett.

On May 1, 1874, Mrs. Gillett leased for a term of ten years the whole of the lot, nineteen feet wide and

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Statement of the Case.

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fifty feet deep, above mentioned, to the defendants. This lease covers the open space in the rear of the plaintiff's store.

It is alleged that the defendants are about to erect upon said lot a building covering nearly the whole thereof, which will so obstruct the light and exclude the air from the rear of the plaintiff's store, as to be an irreparable injury.

The action was tried by the court without a jury. There was some evidence on the part of the plaintiffs, which it was claimed established some right to the use of, and a corresponding right of access to, a privy in the space in the rear of the store. But the defendants fully negated any such right.

It was also proved that in 1873 the plaintiffs, for the purpose of obtaining a greater amount of light, had enlarged the rear windows of the store. But it was done without any "authority, license, right, or privilege from the lessor."

The court dismissed the complaint, and the plaintiffs appealed.

The following opinion was delivered at special term :

FREEDMAN, J.—Plaintiffs' claim to relief rests wholly upon the lease by Ann Gillett of the store on the first floor of No. 85 Forsyth street.

This lease did not carry with it an implied covenant against the obstruction of the windows in the rear of the store. The statute (1 *Rev. Stat., Edm. Ed.*, 689, § 140) is explicit that no covenant shall be implied in any conveyance of real estate—and a lease is a conveyance within the definition of that term contained in the statute. The *only* exception that has ever been recognized by the courts is that the grantor or lessor is held to warrant, by implication, that he has title. In all other respects the rule of *caveat emptor* applies (*Canaday v. Stiger*, 3 *Jones and Sp.* 423; affirmed 55 *N. Y.* 452).

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Statement of the Case.

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Nor did the lease carry with it, as a part of the thing actually demised, the right in the store to derive light and air from the lessor's adjoining land. *Myers v. Gemmel* (10 *Barb.* 537), and *Palmer v. Wetmore* (2 *Sandf.* 316), are conclusive upon me upon this branch of the case. In this connection it may be pointed out that the English doctrine of prescriptive right to ancient lights (which rests wholly upon implied covenants in deeds), though recognized in some of the United States, has been expressly repudiated in this state in *Parker v. Foote* (19 *Wend.* 318). It was held to be inapplicable to the growing cities and villages of this country. This case has been followed in *Pierre v. Ferwals* (26 *Me.* 436), *Napier v. Bulwinkle* (5 *Richard* 99), and *Cherry v. Steir* (11 *Md.* 1).

In Massachusetts, the doctrine, if it ever was recognized, was changed by positive enactment.

Nor did the lease grant the yard or any right therein as appurtenances. I agree with the learned judge who denied the motion for an injunction, that the premises are virtually described as bounded by the four walls of the store.

The lease, therefore, carried nothing beyond the boundary as an appurtenance, except, perhaps, such rights as were clearly and absolutely necessary to the enjoyment of the demised premises in any way; as, for instance, a right of way to the premises, if such right were necessary to obtain access. But the strict necessity and location of such a right must be shown by extrinsic evidence. Now, instead of its being shown that it was necessary, or that it was the intention of the parties that a right to the use of the yard should pass to the plaintiffs, it does appear that, at the request of the plaintiffs themselves, all access to the yard from the store was effectually cut off at or before the commencement of their term.

For these reasons, the erection by the defendants of



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Appellants' points.

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a building within about two feet and eight inches of the rear of the wall of the said store, does not entitle the plaintiffs to the relief prayed for. They should have protected themselves by an express covenant.

The defendants are entitled to judgment dismissing the complaint, with costs.

*Francis Byrne*, attorney, and *A. J. Vanderpoel*, of counsel for appellants, urged :—I. Mrs. Gillett being the owner of the two lots, Nos. 83 and 85 Forsyth street, and having erected the two houses thereon, and being still such owner when she leased respectively to the plaintiffs and to the defendants (by separate demises), the rights of the parties are to be regarded as to the apparent condition of the property. There was a yard, a privy on the same, and two windows in the rear of the store demised to plaintiffs. Consequently the plaintiffs are entitled to light and air, as they then existed. "The lights are an essential and necessary parts of a house" (*Palmer v. Fletcher*, 1 *Levinz*, 122; *Robbins v. Barnes*, *Hobart*, 131; *Nicholas v. Chamberlain*, *Cro. Jac.* 121; *Cox v. Matthews*, *Ventris*, 237; *Riviere v. Bower*, *Ryan & Moody*, 24; *Compton v. Richards*, 1 *Price*, 27; *Coutts v. Graham*, 1 *Moody & Malk.*, 396; *Story v. Odin*, 12 *Mass.* 157; *Peyton v. the Mayor, &c., of London*, 9 *Barn. & Cress.* 725). All the above are cited with approbation in *Lampman v. Milks* (21 *N. Y.* 505), and the English law, as to lights, and easements, servitudes, &c., established where the houses have been erected or are owned by the same proprietor. It is there stated that the decision of *Parker v. Foote* (19 *Wend.* 309), as to "the first portion of the rule laid down," &c., "has no bearing upon the doctrine, that if a man builds a house, at the same time owning both the site of the house and the adjoining land, and then sells the house, neither he nor his grantees can afterwards build upon the vacant ground so as to ob-

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Appellants' points.

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struct the windows of the house." The following cases — *The New Ipswich Factory v. Batcheldor* (3 *N. H.* 190) ; *The United States v. Appleton* (1 *Sumner*, 492)—are likewise approved therein. In *Myres v. Gemmel* (10 *Barb.* 543), the court refers to the adaptation of buildings on adjoining lands for light and air, &c.

II. Light and air, and the right to go into the yard, were easements and appurtenances, &c. (*Browning et al. v. Dalesme*, 3 *Sand. S. C.* 13, a case between tenants in the same building, as to right to use of hatch and hoist-way, and of passage and light).

III. The windows as existing, and the yard were "apparent," and so the plaintiff's rights were to be respected (*Butterworth v. Crawford*, 46 *N. Y.* 349, which was a case of two lots and a privy built on the line and a drain from it through one lot under ground). See also *Huttmeir v. Albro* (18 *N. Y.* 48, an easement as to a rear alleyway). "It is a general rule that upon a conveyance of land, whatever is in use for it as an incident or appurtenance passes with it," at p. 51, *Voorhees v. Burchard* (55 *N. Y.* 98). A grant of land (a mill site) by metes and bounds carried with it a mill yard adjoining as appurtenant (*Marvin v. Brewster Iron Mining Co.*, 55 *N. Y.* 549, 550, and 561; and *Washburn's Easements and Servitudes*, 3 *Ed.* 37, &c., *Willard on Real Estate, &c.*, 218, &c.).

IV. The defendants took title from Mrs. Gillett upon a covenant "that the changes they should make" shall not interfere with "Doyle and Adolphi."

V. The plaintiffs fully proved their case, and the court assumed "that there was an interruption of the light and air by the acts of the defendants, as stated in the complaint, and that the plaintiffs had various witnesses in court to prove such allegations," therefore, the relief claimed should have been granted, and the motion to dismiss the complaint denied. The case of *Canaday v. Stiger* (55 *N. Y.* 452), cited by the learned

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 Respondents' points.
 

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Justice FREEDMAN, as authority to sustain his views, seems to be against him, and in fact supports the plaintiffs' view. At page 454, Chief-Judge CHURCH says: "The parties are presumed to have been on the ground, and known the condition of the house and the state of its completion."

VI. If Mrs. Gillett desired to change the legal effect of the demise, and the rights thereunder, she should have reserved a privilege by agreement to build upon the yard, and to close up the windows. The mere fact that plaintiffs did not use the privy, did not prevent them from doing so; they did not surrender or part with any of their rights.

*T. D. Pelton*, attorney and of counsel for respondents, urged as to the matters discussed and decided:—I. The plaintiffs are not entitled to relief, upon the ground that the defendants' occupation will interfere with the light and air flowing through their windows. There is no authority in this state to support the plaintiffs, and they must rely upon the English doctrine in relation to the obstruction of light and air. By that doctrine, and in the absence of express grant or covenant, the right to unobstructed lights may be established in two ways. (1) By prescription—as when one's windows have overlooked his neighbors unoccupied land for twenty years. Although we are not directly concerned with this branch, for the plaintiffs have occupied but four years, yet it should be noted that the doctrine of "ancient lights" has been expressly repudiated in this state, and held inapplicable to the growing cities and villages of this country (*Parker v. Foote*, 19 *Wend.* 316; *Radcliffe v. The Mayor*, 4 *Coms.* 195). (2) By implied covenant against obstruction, as where one conveys his house with windows overlooking his adjoining land (*Saddon v. Senate*, 13 *East.* 79; *Pomfort v. Ricroft*, 1 *Saund.* 322, 4 *Kent's Com.* 473).

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(a.) There can be no express or implied grant of light and air. They are common blessings, not subject of limitation, and can not be granted (*Parker v. Foote*, *supra*, 315; *Cross v. Lewis*, 2 *Barn. & Cress.* 628; *Washburn on Real Property*, 2d vol. 3d ed. 317; *Moore v. Rawson*, 3 *Barn. & Cress.* 340). (1) It follows that the plaintiffs must rely upon the second branch of the doctrine, or upon an implied covenant against the obstruction of light and air. (2) No covenant can be implied from the lease to the plaintiffs (1 *Rev. Stat.* Edmond's ed. § 140, p. 689; *The Mayor v. Mabie*, 13 *N. Y.* 155; *Kinney v. Watts*, 14 *Wend.* 38).

II. There was no demise of a right to the plaintiffs to derive light and air from the adjoining premises or rear lot. Such a right can not exist in this case without the implication of covenants. A grant can not be extended by implication (*Grant v. Chase*, 17 *Mass.* 441, 3 *Cruise Dig.* 47, art. 51. (1) The question presented here has been fully considered, and decided adversely to the plaintiff's claim, in *Myers v. Gemmel*, (10 *Barb.* 537, 546); *Palmer v. Wetmore* (2 *Sand.* 316). The facts presented in these cases are so completely analogous to the present, that nothing can be added to their effect. (a) These cases have been recognized and approved by the court of appeals in *Johnson v. Oppenheim* (55 *N. Y.* 293); *Washburn on Real Property*, 313. (b) The same doctrine, declared upon analogous facts, is found in *Collier v. Pierce* (7 *Gray*, 18); *Heverstick v. Sipe* (33 *Penn.* 368); *Mullen v. Stricker* (19 *Ohio* 135); *Morrison v. Marquand* (34 *Iowa*, 35).

III. (1) The opinion of Judge Selden in *Lampman v. Milk* (21 *N. Y.*), is not an authority. The matter there discussed was not before the court, nor was the point essential to the decision of the case. The opinion is an *obiter* and not a precedent. "A precedent in law is a decision arrived at by a competent tribunal

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 Respondents' points.
 

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after a pertinent inquiry upon the points bearing upon the subject discussed" (Moloney v. Dows, 8 Abb. 321; Cohens v. Virginia, 6 Wheat. 264 and 299; 1 Bishop on Criminal Procedure, Sec. 1031-1033).

IV. The plaintiffs are not entitled to relief in this action, upon the ground that the defendants have removed the privies from, and occupied the premises in the rear yard. (1) That yard, with its privies, was not appurtenant to the store. The premises are clearly described, to wit: "all that store on the first floor, &c., to be occupied by them as a dry goods store, with the appurtenances." There is no pretense that the privies, or use of the yard, was (like a right of way) necessary to the enjoyment of the store. Plaintiffs had privies on other premises. (a) The premises granted are clearly defined in the deed, and are limited to the four walls of the store. The premises described in a deed can not be enlarged by the word "appurtenances" (Grant v. Chase, 17 Mass. 441; Manning v. Smith, 6 Conn. 291; 3 Cruise Dig. 272). (b) There can be no presumption that the lease carried with it anything beyond the premises described. As the yard and privies were not within the description, the plaintiff's right to use them can only be established by evidence that the parties contemplated and understood that such right should pass to the plaintiff as incidental to the premises (*Phillips on Ev. C. & H.* page 1403, note 956; 1 *Greenleaf on Ev.* 286; *Carry v. Thompson*, 1 *Daly*, 35). "Whether a thing not specifically described in the deed is a parcel or not of the thing demised, is always a matter of evidence" (BULLER, J. in *Doe v. Burt*, 1 *Term Rep.*, 704). (c) The facts show that it was not intended by the parties that a right to use the yard and privies should pass to the plaintiffs.

*Mr. Pelton* also made, with others, the following

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point: The defendants had occupied the yard and removed the privies before the commencement of this action; the court will not restrain the defendants by injunction from doing an act already done; but leave the plaintiffs to their remedy at law, which is ample (*Bean v. Coleman*, 44 *N. H.* 547); and also points as to the effect of the alteration of the windows by the lessee.

BY THE COURT.—MONELL, Ch. J.—The decision of this case rests, I think, solely upon the construction, force, and effect of the lease from Ann Gillett to the plaintiffs.

I am unable to discover anything in the extraneous or cotemporaneous facts or circumstances, which creates, enlarges, or varies the rights of the tenants. Whatever they acquired was under and in pursuance of their lease. If there was any parol understanding, it was before the lease was signed, and can not, therefore, be allowed to vary or contradict the terms of the lease. Nor can any right be derived from the former occupancy, or the designed present use of the building. In both cases, doubtless, light and air were essential to its beneficial use and enjoyment; and the destruction or interruption of either, may seriously impair the habitability of the structure.

But light and air, however free and of common right, are not so inherent in a demise, that the lessor must absolutely protect his lessee in the free and uninterrupted enjoyment of them. The right may be secured by express contract, and the tenant may protect himself, by making the lease terminable upon the happening of any substantial interference by the landlord, or those under him, with the use of these essential and desirable elements. But the law implies no such right and imposes no such obligation.

There is no express *covenant* in the plaintiff's lease which covers the right they claim. The only covenant

is of quiet and peaceable enjoyment, which is broken only by actual, or possibly constructive eviction, and is always satisfied by damages.

The case rests, therefore, as has been already said, upon the *quantum* of interest the plaintiffs took under their lease. And for the purpose of examining the question, it may be treated as if the threatened obstruction was by Mrs. Gillett, and not by her tenants.

And it here may be said, that there is nothing in the letting to the defendants, which creates or recognizes any right in the plaintiffs, other than such as may be fairly implied from their lease.

It is well settled that the English law as to lights has not been adopted in this country (*Parker v. Foote*, 19 *Wend.* 309; *Auburn, &c., Plank Road Co. v. Douglass*, 9 *N. Y.* 447).

There is, therefore, no prescription growing out of a long user, which gives a right to a continued and uninterrupted use of light; and unless it passes to a tenant, as an incident or appurtenant to his lease, the law will not restrain the landlord from occupying or improving the adjacent space, even though such occupancy may impair or totally destroy, the beneficial use of the tenant's property.

This may seem harsh doctrine; but the rights, duties, and obligations of parties are governed by well-settled principles of law, and by the application of such principles their rights must be determined. If such principles do not afford sufficient protection, it is always in the power of parties to protect themselves by express contract.

The plaintiff's lease was of the store within its four walls. It did not cover any right to the use of any adjacent space, for any purpose whatever. Light is not an appurtenant, in the sense that it legally appertains to and is a part of the principal thing. If ancient lights are not protected in this country, even where the

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use has continued and been uninterrupted for a long period of time, how can a tenant whose use of the light begins only with his term claim such protection? His landlord does not engage that he shall have any more than is specified. What he does not express, can not be implied, unless the law implies it. And implications of an obligation on the part of a lessor in his lease, except that the tenant shall quietly enjoy, can not be made.

The case of *Palmer v. Wetmore*, in this court (2 *Sandf.* 316), determined this question. The action was upon the covenant to pay rent. The defense an eviction.

The plaintiff owned several lots, one of which he demised to the defendant. He afterwards built on some of the other lots, and the building obstructed the light in the defendant's windows. OAKLEY, Ch. J., says,—“where there is no question of ancient light, the owner of a lot adjoining a house may so improve or build upon his lot, as to shut up the windows of such house that are situated in the end or side adjacent to his lot. We see no reason why a landlord, in respect to his tenant, is more restricted as to his vacant lots than he would be in respect to any other owner, for years or in fee, of an adjacent house.”

That decision has not been authoritatively disturbed, and the principle has been frequently recognized and affirmed (*Banks v. Am. Tract So.* 4 *Sandf. Ch.* 438, 464; *Mahan v. Brown*, 13 *Wend.* 261; *Picard v. Collins*, 23 *Barb.* 445, 458).

It is not necessary in this case, to go to the extent to which the doctrine is carried in *Palmer v. Wetmore*. There the payment of rent was resisted on the ground of a constructive eviction by reason of the obstruction of light to the demised premises. That, if any, was the tenant's remedy; or, if there was any breach of a covenant, express or implied, he might have sued for damages.



But a remedy at law does not give a remedy in equity; on the contrary it destroys the right to go into equity, except where the injury is irreparable for damages.

There is a *dictum* in *Lampman v. Milks* (21 N. Y. 512), where the learned judge refuses to recognize *Parker v. Foote* (*ubi sup.*), as bearing upon the doctrine, "that if a man builds a house, and at the same time owning both the site of the house and the adjoining land, and then sells the house, neither he nor his grantees can afterwards build upon the vacant ground, so as to obstruct the windows of the house." But the learned judge did not refer to *Meyers v. Gemmel* (10 Barb. 537), nor to *Palmer v. Wetmore* (*ubi sup.*), both of which cases are cited with approval in the much more recent case of *Johnson v. Openheim* (55 N. Y. 293), where the court says, "the mere building upon or other improvement of the adjoining lot, by which the premises of the defendants were rendered less commodious of occupation, or less suitable to the uses of the defendants, did not affect the right of the plaintiff to their rent, or authorize the defendants to terminate the lease and abandon the premises."

The *dictum* in *Lampman v. Milks* was *obiter*. The action was for diverting a water-course, and involved the question of servitudes and easements passing under a *deed*, and not rights which at most rest upon prescription.

Upon the whole, I am of the opinion, that this case was decided correctly at the special term. There was nothing expressed in the written lease, or that could legally be implied from it, nor in the relation of the parties, that gave to the plaintiff such an absolute right to the use of light to the demised premises, as, if he was deprived of it by their lessor or his grantees, would constitute a cause of action.

It follows, therefore, that there has been no threat-

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ened illegal interference with or obstruction of such light, so as to furnish a status to the plaintiffs to seek the restraining power of the court to prevent it.

The judgment should be affirmed, with costs.

SPEIR, J., concurred.

CURTIS, J. (dissenting).—In 1859, Ann Gillett conveyed to Samuel Lord thirty feet in depth the rear part of lots Nos. 83 and 85 Forsyth street. These two lots were adjacent, and twenty-five feet each in width, and one hundred feet deep. The fronts were occupied by two five-story buildings, fifty-one feet in depth, the upper stories used as tenements, and the first stories as stores or tenements. In the rear of these, there was left a yard nineteen feet in depth, which Ann Gillett in 1859 covenanted with Samuel Lord not to obstruct within the space of ten feet for twenty years, granting him the privilege of windows, &c.

In 1870, Ann Gillett leased to the plaintiffs, "all that store on the first floor of the building known as No. 85 Forsyth street, in the city of New York, to be occupied by them as a dry-goods store, with the appurtenances," for the term of five years from May 1, 1871. May 1, 1874, Ann Gillett leased to the defendants the two houses and lots, Nos. 83 and 85 Forsyth street, for the term of ten years, subject to the lease to the plaintiffs, and with the provision that any change made by them for business purposes should not interfere with the plaintiffs in the occupation under the lease to them.

Previous to the letting of the store, No. 85 Forsyth street, by Ann Gillett to the plaintiffs, the first floor was partitioned in the middle, the front part being used as a store; and the rear part, which was divided by partitions into two rooms, was used as a residence. There were two windows in the rear wall, about three by six feet in size, and a door between them leading into the

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yard in the rear, where there were privies. There was another door opening from the "floor" into a hallway, which led from the front entrance to the yard.

The plaintiffs agreed to hire the store upon conditions : that the partition should be taken out ; that the doors leading into the rear yard and hall should be closed up ; and the rear windows be bricked up about three feet, and the remainder be barred by six or eight iron bars. These changes were made before the plaintiffs' lease commenced.

The plaintiffs never had any means of access to the yard, except by going into the street, and thence through the hall. They never had keys to, and never used, the privies. They had water-closets elsewhere. In 1873, the plaintiffs, without consent of the landlord, enlarged the rear windows to about five by eight feet, their present size. This was prior to the lease of Ann Gillett to the defendants. Since the execution of the lease from Ann Gillett to the defendants of May 1, 1874, the latter have erected a wall within three feet of the rear of the plaintiffs' store, about twenty feet high, and extending about four feet above the top of the plaintiffs' rear windows. There is room between the wall and windows for the plaintiffs' shutters to swing. The wall is painted white.

The evidence showed that this wall obstructed the light flowing through the present windows, and injured plaintiffs' business.

The object of the action is to restrain the defendants from erecting the wall, and from occupying the yard to the exclusion of the plaintiffs.

The plaintiffs insist that they have the right to the full and unrestricted enjoyment of the light and air flowing into the store, to the extent that they had before the defendants obstructed it, and also the right of access to the yard, and that the defendants should be enjoined from proceeding with the building.

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The complaint was dismissed at the trial, and the plaintiffs excepted.

It is unnecessary to consider the evidence as to whether the plaintiffs were interfered with by the defendants, as complained of, in respect to light and air, as the learned judge at the trial stated, that for the purpose of hearing the motion to dismiss the complaint, he would "assume that there was an interruption of the light and air by the acts of the defendants, as stated in the complaint, and that the plaintiffs had various witnesses in court to prove such allegations."

The plaintiff Doyle testified: "I did not exercise the right to visit the water-closet, because we had water-closets in the Grand street store." The evidence showed that the latter were in plaintiffs' adjoining premises, and that there were water-closets in the rear of the yard of No. 85 Forsyth street.

The first question for consideration is, what construction is to be given to the lease from Ann Gillett to the plaintiffs. The premises leased are therein described as "All that store on the first floor of the building known as No. 85 Forsyth street, &c., to be occupied by them as a dry goods store, with the appurtenances." The store with the appurtenances is distinctly demised, and the character of the occupation of it carefully designated.

In addition to what is expressed in the lease, there is other written evidence of the intention of the parties, as to what was to be enjoyed with the store. In the agreement of Ann Gillett of July 27, 1870, produced in evidence by the plaintiffs, she binds herself "to cut a doorway in brick wall, and brick up present back door, and put iron bars in the two rear windows." This agreement was carried into effect. It clearly manifests an intention that the plaintiffs should have the enjoyment of these windows looking into the yard, and that moreover she would place iron bars there to

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protect them in such enjoyment from any trespasses incident to the open nature of the yard, and by the change of the door another means of access was to be created. It is evident she knew these windows, with their incidents of light and air, were elements of value in the occupancy and letting of her store, from her having leased to Samuel Lord in 1859, for two hundred dollars, the right for twenty years to place windows in his building looking into this very yard, which she also covenanted not to be obstruct.

This shows that she knew, when she undertook to protect these windows as a condition of the plaintiff's taking the store, that their use without obstruction was valuable, and that she intended it to pass with the store to the plaintiffs under the lease. Again, if her lease to the defendants of May 1, 1874, is referred to, embracing the premises in question, and under which the defendants claim, it will be seen that she not only makes it subject to the plaintiffs' lease, but also provides that the defendants shall not interfere with the plaintiffs in the occupation under the lease to them. The evidence is, that the year previous to the lease to defendants, the plaintiffs had very much enlarged the rear windows, and increased their capacity for light and air, to that extent modifying the nature of their occupancy.

From all these instruments which are to be considered together, it is apparent, that it was the intention of the lessor that the plaintiffs should have the right to the use of the rear windows, and access to the yard, without obstruction or interference. The written evidence shows the enjoyment of these rights and incidents was in the contemplation and intention of both parties at the time.

It is shown that the light from these windows is highly desirable and beneficial, and necessary for a dry goods store, that being the occupancy of the prem-

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ises, to which the plaintiffs were limited by the terms of their lease, and that their sales largely depended upon it. It can not be presumed that the plaintiffs were ignorant of its value when they took from their lessor an agreement specially providing for the protection of these windows. If the yard and windows were incident and appurtenant to the premises, can there be any question that they passed to the plaintiffs under the description of the store "with the appurtenances," as stated in their lease? It is urged by the defendants, that the plaintiffs did not use the yard. They used it so far as it was an auxiliary to the enjoyment of the windows looking into it; they derived light and air from it, and if they did not use the water-closets, it was a preference which did not affect their legal rights in respect to the privileges of the yard.

From *Bucher v. Sanford* (*Gouldsborough R.* 99, *Anno*, 30 *Eliz.*) to *Voorhees v. Burchard* (55 *N. Y.* 98), and *Marvin v. Brewster Iron Mining Co.* (*Id.* 538), the courts have been constantly called on to construe what passes by the words *cum pertinentus*. It was early held that a curtilage or court-yard is parcel of the house and passes with it, because its use is a necessity (*Curden v. Truck*, *Croke Eliz.* 89). A late jurist says, "If a house or store be conveyed, everything passes which belongs to, and is in use for it, as an incident or appurtenance" (4 *Kent Com.* 467). He also again says, "That the right to the enjoyment of free and pure air, as incident to the estate, is likewise under the protection of the law" (3 *Kent Com.* 448).

These definitions seem broad enough to embrace the rear windows and yard, and the tendency of the decisions is rather to enlarge than to restrict their scope.

In *Huttemeyer v. Albro* (18 *N. Y.* 50), it is said by Strong J., "The easement will exist for the common benefit, &c., if it is apparent from the conveyances and

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Dissenting opinion of CURTIS, J.

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the circumstances connected with the manner of the use and enjoyment of the land, that such was the intention of the parties."

When anything is granted, access, and all else necessary for its full and free enjoyment, passes as an incident appurtenant (*Comstock v. Johnson*, 46 *N. Y.* 620; *Voorhees v. Burchard*, 55 *N. Y.* 103; *Marvin v. Brewster Iron M. Co.* *Id.* 549; *Browning v. Delesme*, 3 *Sandf.* 18).

Having arrived at the conclusion that the lease to the plaintiffs must be construed to pass, as appurtenances to the store, the rear windows and the unobstructed flow to them of light and air from the yard, as it was at the time of the demise, and also the right of access, and that the defendants' title was subject to the occupancy of the plaintiffs, under their lease, of the yard as it then was, it becomes unnecessary to consider most of the remaining questions presented on the argument. Whether an implied covenant for quiet enjoyment exists in the lease to the plaintiffs, and what application should be given in this case to the maxim, *Cujus est solum, ejus est usque ad cælum*, and what rule prevails as to ancient lights are among them. Nor do the cases of *Palmer v. Wetmore* (2 *Sandf.* 316), and *Myers v. Gemmel* (10 *Barb.* 537), seem relevant in this point of view, for they are instances where the landlord built on adjoining lots and not upon any part of the demised premises. Neither does the question arise to be necessarily passed upon, as to the effect upon the first conveyance of a severance by the common owner, upon the holders of the two portions, in respect to any open and visible servitude or benefit affecting their respective parts by him previously created.

Under this construction of the case as to what passed by the words, "with the appurtenances," it would seem that the plaintiffs were entitled to the injunction they moved for.

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Statement of the Case.

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The judgment and order appealed from should be reversed, and a new trial granted, with costs to abide the event.

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FIRST NATIONAL BANK OF PORTLAND,  
MAINE, PLAINTIFF AND RESPONDENT, v. GAR-  
RET L. SCHUYLER, ET AL., DEFENDANTS AND  
APPELLANTS.

I. BILL OF EXCHANGE.

1. ACCEPTANCE, ACCOMMODATION AFTER DISCOUNT OF.

1. *Liability of acceptor.*

a. The acceptor is *liable* to the party who, in good faith and for value, discounted the bill before its acceptance.

1. *Knowledge.* This, although such party knew it was to be accepted for the accommodation of the drawer.

2. EVIDENCE FOR PLAINTIFF IN AN ACTION ON SUCH ACCEPTANCE.

1. *Previous transactions.—Credit.*

Evidence of previous similar transactions between the parties, that plaintiff in discounting the bill relied chiefly on its being accepted by the drawee, and that the plaintiff at the time of discount had no knowledge that it was not drawn in the usual course of business, is *proper*, if not necessary, as tending to show plaintiff to be a *bona fide* holder for value.

II. EVIDENCE.

1. QUESTIONS.

a. What not objectionable, as calling for a *conclusion of law*, or for evidence *beyond the knowledge of witness*.

Before MONELL, Ch. J., FREEDMAN and SEDGWICK, JJ.

*Decided June 7, 1875.*

Appeal from a judgment.



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Statement of the Case.

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The action was to recover against the defendants as the acceptors of a bill of exchange.

The defendants alleged that their acceptance was without consideration and for the accommodation of the drawer; and that the plaintiffs received it with knowledge that it was an accommodation acceptance, and entirely upon the credit of the drawers; and that the plaintiffs paid no consideration therefor, and are not the lawful or *bona fide* owners.

The bill of exchange was drawn at *Portland*, by R. Holyoke, upon the defendants in *New York*. Before acceptance it was discounted for Holyoke by the plaintiffs, and by them sent to New York for acceptance, and was there accepted by the defendants. There had been many previous similar transactions between Holyoke and the bank, in which they discounted the drafts before acceptance; all of which had been accepted and paid by the defendants.

The plaintiff's president was examined upon a commission, and the defendants objected severally to the following interrogatories:

"State whether the plaintiff, by any or either of its officers or agents, or either of them, before discounting said draft, had any knowledge or information that the same was not drawn in the regular course, or that the same was accepted by the defendants without consideration, or for the accommodation of the drawer thereof; state what, if any, knowledge or information the plaintiff's officers or agents had in respect thereto."

"State whether the plaintiff had previously discounted the drafts of R. Holyoke, accepted or endorsed by these defendants; if yea, when, to what amount, and whether the same was paid by the defendants at maturity."

"Upon what credit did the plaintiff chiefly rely in discounting the drafts in suit, and why?"

The first interrogatory was objected to on the

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grounds: 1st, that it is leading; 2d, that it calls for a conclusion of law; 3d, that it calls for evidence necessarily beyond the knowledge of the witness.

The seventh interrogatory was objected to as calling for immaterial evidence.

The eight interrogatory was objected to on the grounds: 1st, that it calls for a conclusion of law; 2d, that it calls for something beyond the knowledge of the witness.

The objections were overruled, and the defendants excepted.

In answer to the interrogatories the witness stated, that the plaintiffs had no knowledge or information, that the bill was not drawn in the usual or regular course; or that the acceptance was without consideration or for the accommodation of the drawer. That the bank had previously discounted drafts drawn in the same manner, which were subsequently accepted and paid by the defendants; and that in discounting the bill, the plaintiffs relied chiefly upon the defendants, as acceptors, for the reason that all the previous bills had been paid by them.

One of the defendants was examined as a witness. Evidence of the time of acceptance, and that it was after the discount, that the acceptance was without consideration and for the accommodation of the drawers, was objected to by the plaintiffs, and excluded by the court.

The defendants excepted.

The court directed a verdict for the plaintiffs. The defendants excepted and appealed from the judgment.

*F. G. Smedley*, attorney and of counsel for appellants, on the points noticed by the court in its opinion, urged:—I. The interrogatories objected to were objectionable on each of the grounds urged by defend-

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ants, and should have been disallowed. The last one was especially objectionable. The question as to what credit is relied on in a transaction is always incompetent (See *Merritt v. Briggs*, 11 *Alb. Law J.*, 273, in commission of appeals). In the case at bar it is a conclusion of law that plaintiff relied on credit of R. Holyoke (Farmers' & Mechanics' Bank v. Empire Stone Dressing Co., 5 *Bosw.* 275, on page 290).

II. The court below erred in excluding the evidence offered by defendants as to want of consideration for the acceptance. The plaintiff was not, as against the defendants, a *bona fide* holder for value of the bill in suit. The plaintiff was the party with whom the contract of acceptance was made, and it being made without consideration, the plaintiff can not recover from defendants (Farmers' & Mechanics' Bank v. E. Stone Dressing Co., *supra*). The evidence offered, if uncontradicted, would have entitled defendants to a dismissal of the complaint under the authority last cited.

*Chase, Bestow & Holt*, attorneys, and *Philo Chase*, of counsel for respondent, urged on the points noticed by the court in the opinion:—I. The court properly excluded the testimony offered by the defendants. It was entirely immaterial whether the draft was accepted before or after being discounted by the plaintiff, or what consideration there was for the acceptance, or whether the draft was accepted for accommodation, and without consideration. The defendants, in their answer, admit their acceptance of the draft. The defendants proved by Gould, the cashier of the bank, that Holyoke, the drawer, applied to the bank to discount the draft; that the application was referred to the board of directors; that the bank then discounted the draft, and paid Holyoke the full amount thereof, less the bank discount, and placed the amount paid to his credit in his account with the bank, and which he subse-

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quently drew out. Here was proof given by the defendants themselves that the plaintiff discounted the draft in the regular course of business, and paid full consideration therefor. The plaintiff took the draft upon the assurance of Holyoke that he had drawn the draft against lumber shipped by him to the defendants. The plaintiff discounted the draft in anticipation of its acceptance by the defendants. They had accepted and paid all the previous drafts drawn against them by Holyoke, discounted by the plaintiff, under similar circumstances. They accepted the draft in question. The plaintiff had every reason to believe they would pay this as they had paid the others.

II. It was no defense to this action that the defendants were accommodation acceptors (*Grant v. Ellicott*, 7 *Wend.* 227; *Grandin v. Le Roy*, 2 *Paige*, 509; *Redfield & Bigelow on Notes and Bills*, 216; *Edwards on Bills*, 430; *Chitty on Bills*, 81). It is an elementary principle that an accommodation acceptor is liable to a *bona fide* holder for value, though the latter have notice of the accommodation (*Story on Bills*, §§ 191-253; *Chitty on Bills*, 305). The evidence offered was immaterial, and properly excluded by the court.

III. It was no defense to this action if the defendants did accept the draft after it was discounted by the plaintiff (*Commercial Bank of Lake Erie v. Norton*, 1 *Hill*, 507; *Mechanics' Bank v. Livingston*, 33 *Barb.* 458; *The Bank of Louisville v. Ellery*, 34 *Barb.* 633; *Williams v. Winans*, 2 *Green's Rep.* [*N. J.*], 339).

IV. The mere matter of time, when the note is signed or bill is accepted, in such case, is immaterial. The act of signing or accepting relates back to the delivery of the note or bill (*Mechanics' Bank v. Livingston*, *supra*; *Story on Bills*, § 201; *Chitty on Bills*, 8th. *Am. Ed.* 263).

V. There was sufficient consideration for the acceptance of the bill by the defendants. The accep-

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Opinion of the Court, by MONELL, Ch. J.

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tance itself implied consideration (*Mechanics' Bank v. Livingston*; *The Bank of Louisville v. Ellery*, *supra*, and cases cited). There was sufficient consideration in the forbearance of the plaintiff to resort to the drawer, as it would have done in case of non-acceptance by the defendants.

BY THE COURT.—MONELL, Ch. J.—The evidence was uncontradicted that the plaintiffs discounted the bill of exchange for the drawer in the regular and usual way, that it was subsequently accepted by the defendants without qualification, and that it had not been paid.

This left no question for the jury; and if upon the undisputed facts the plaintiff can recover, then the verdict must be upheld.

The plaintiffs were undoubtedly the *bona fide* owners of the bill. An accommodation acceptor of such a bill becomes liable to the holder, even though the holder knew the acceptance was without consideration (*Story on Bills*, §§ 191, 253).

The time of the acceptance is not material, and may as well be after as before it passes to the holder (*Mechanics' Bank v. Livingston*, 33 *Barb.* 459, 465, which was a case in all respect like the one before us. And see *Bank of Louisville v. Ellery*, 34 *Barb.* 630, and *Commercial Bank v. Norton*, 1 *Hill*, 501, 508).

The circumstance that the bill had not been accepted when it was discounted by the plaintiffs, rendered it proper, if not actually necessary, for them to show that they had paid value for it; and having shown that, it constituted them *bona fide* holders, and shut out any defense of want of consideration between the drawer and acceptors. Hence the evidence to prove the manner of the plaintiffs becoming the holders of the bill, objected to by the defendant, was properly allowed to be given. Until acceptance, the legal reli-

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Opinion of the Court, by MONELL, Ch. J.

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ance of the plaintiffs was upon the drawer. But having paid value for the bill, the subsequent acceptance by the drawees, whether voluntary and for the accommodation of the drawer, or otherwise, enured to the plaintiffs, and constituted it a legal liability of the defendants.

For these reasons the evidence offered by the defendants was wholly immaterial, and was properly excluded. That the acceptance was without consideration, and for the accommodation of the drawer of the bill, constituted no defense to an action by these plaintiffs, even though it had been shown that they had discounted the bill with knowledge of those facts. They had become *bona fide* holders, and that was enough to exclude the defense.

The direction to the jury was correct, and the judgment entered upon their verdict should be affirmed.

FREEDMAN, and SEDGWICK, JJ., concurred.

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Statement of the Case.

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JAMES KEMPLE, PLAINTIFF AND RESPONDENT, v.  
JOHN DARROW, ET AL., DEFENDANTS AND AP-  
PELLANTS.

I. CONTRACT SILENT AS TO TIME OF PERFORMANCE.

1. Requires some *act of the parties*, such as an *offer or demand* to limit the time.

*Until*

such act the contract *continues open* for performance.

*But*

upon the doing of such act *by one party, the other is bound* to respond by performing the covenants to be by him performed on the doing of such act. If he fails so to respond, he is guilty of a breach of the contract, and *liable therefor*.

II. REFEREE'S FINDINGS.

1. WHAT NECESSARY FOR PURPOSES OF APPEAL.

1. A party who *deems certain facts* as essential to his case, *must procure the referee to either find or refuse to find them*.
  - a. If the facts as claimed to exist are *not found*, the general term *can not assume them to exist*; and if there is *no refusal* to find them, the court *can not look into the testimony* to see whether there is any evidence to support them, or whether the referee ought to have found them.
  1. *A general finding* can not be affected by any evidence of a *particular fact*, which the referee has neither found nor refused to find.

EXAMPLE. A defendant agreed to furnish a plaintiff with certain materials, in such numbers and amounts as might be required. The referee found generally that defendant had failed to perform,

*Held,*

that, whatever evidence there was which it was claimed established that, by the agreement between the parties, the material was all to be delivered within a certain time, and that plaintiff would not permit a delivery within that time, but had improperly delayed and obstructed defend-

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 Statement of the Case.
 

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ant, so that he could not make delivery within the time, and had refused to allow delivery to be made when he was ready to do so, neither the claimed fact that the time of performance was limited by the contract, nor the evidence which it was claimed supported it, could be considered, the referee having neither found nor refused to find specifically on such claimed particular fact.

### III. COSTS OF APPEAL.

#### 1. WHEN NOT ALLOWED TO EITHER PARTY.

- a. Will not be when the judgment below *was for too much*, and plaintiff on discovering the error *offered*, soon after the appeal, to make the proper *reduction*.

Before MONELL, Ch. J., FREEDMAN and SEDGWICK, JJ.

*Decided June 7, 1875.*

Appeal from the judgment of a referee.

The action was to recover damages for the breach of a written contract for the delivery of materials for building. The plaintiff alleged the non-delivery, and claimed to recover the difference between the market and contract price.

The answer averred that the materials were to be delivered before the commencement of the next ensuing winter; that the plaintiff neglected to proceed with the work, and would not permit the defendants to make the delivery within the time aforesaid; and that he so improperly delayed the erection of the building, and so obstructed the defendants, that they could not make the delivery of such materials, and had refused to allow the delivery to be made when the defendants were ready to do so.

The action was tried by a referee who found as facts:

That under the agreement, the defendants delivered to the plaintiff certain materials mentioned therein, but notwithstanding that the plaintiff fully did and performed all the terms and conditions of the agree-



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Statement of the Case.

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ment on his part to be done and performed, the defendants from the middle of December, 1871, neglected and refused to deliver to plaintiff such materials in numbers and amounts as required under said agreement up to January 20, 1872; and on and from that day forth, defendants have wholly failed and refused to deliver to plaintiff any such materials whatever.

That at the time of such neglect, failure, and refusal, such materials were largely appreciating in market value, and in consequence of such neglect, failure, and refusal, the plaintiff was compelled to purchase, and did purchase for the building of said school-house, from other persons than the defendants, and at prices largely in excess of the prices agreed in and under the agreement to be paid therefor to the defendants, certain building materials, and was compelled to pay, and did pay, for the delivery thereof, and for cartage for the same; and that he paid for said materials in excess of what he was required to pay under the contract, and for carting the same, the sum of eighteen hundred and forty-nine dollars and forty-nine cents.

That such materials so purchased from other persons than defendants, were fairly and reasonably worth the sums paid therefor by the plaintiff, and the sums paid for carting the same were fair and reasonable.

The defendants excepted to the several findings of fact.

No exception was taken to the admission or exclusion of evidence; nor was the referee requested to find any facts other than such as were found by him.

The defendants appealed from the judgment.

After the appeal was taken, an error in the computation of the referee was discovered amounting to five hundred and thirty-nine dollars and twenty-four cents. Whereupon the plaintiff and respondent gave to the defendants and appellants a written stipulation to deduct that sum from the judgment.

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Opinion of the Court, by MONELL, Ch. J.

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The stipulation was produced upon the argument of the appeal.

*Townsend & Mahan*, attorneys; and *H. P. Townsend*, of counsel for appellants.

*B. P. Kernan*, attorney; and *J. A. McCaffery*, of counsel for respondent.

BY THE COURT.—MONELL, Ch. J.—The contract was silent as to the time of delivery, and either party could have limited the time by a demand or offer. Omitting to so limit the time, it was a continuing contract, until rescinded by the failure of the defendants to perform.

There was some evidence tending to show some intention or understanding of the parties, that the material was to be delivered before the close of the current year; but it was not of a nature to so limit the time as to excuse a performance afterwards.

The referee has made no finding on that subject. His general finding is, that the plaintiffs have, and that the defendants have not performed the contract. He was not requested to find that the time for the delivery of the materials had by parol been fixed by the parties; and there is no exception by the defendants that will enable them to insist now that the evidence would have warranted such a finding.

The court in reviewing a referee's judgment can look only at his findings of fact, and if they are sustained by the evidence, the judgment must be affirmed (*Anderson v. West*, 38 *Superior Court Reports*, 441).

To raise any other question, there must be a refusal to find.

That presents a question of law which may be examined by the appellate court (*Meacham v. Burke*, 54 *N. Y.* 217).

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Opinion of the Court, by MONELL, Ch. J.

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The presumption is that the referee has not alone found all the facts necessary to support his conclusions of law, but that he has also found all the facts warranted or sustained by the evidence. And if it is claimed that there are other or further facts which there is evidence to support, the attention of the referee must be directed to it. If it is not, the court will not, as was said in *Mosher v. Hotchkiss* (3 *Keyes*, 161), explore the evidence to ascertain whether there are not other facts which might have been found, and if found, would have authorized a discussion of the questions now for the first time suggested.

And therefore it is that all the presumptions are, that the findings are in harmony with the conclusions upon *all questions*, when the evidence is capable of that construction (*Morgan v. Mulligan*, 50 *N. Y.* 665).

The general finding, therefore, that the defendants had failed to perform their contract with the plaintiff, is not affected by any evidence which it might have been claimed limited the time of delivery.

Throwing all that evidence, as we must, out of view, it was clearly established that the time of performance was not fixed or limited; and that until it was fixed, the plaintiff could demand performance. It was also established that he did demand performance, and that performance was refused.

The remaining question is one of damages.

The rule adopted by the referee was correct; viz., the difference between the contract price and the fair market value of the materials.

The error in allowing cartage as part of the damages, was discovered by the respondent soon after the appeal was taken, and he offered to deduct the amount from the judgment. It follows from our view of the whole case, that the appellants ought to have accepted the offer and discontinued their appeal.

We can now, however, modify the judgment by

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deducting from it the sum of five hundred and forty-three dollars and twenty-four cents, with interest from December 16, 1874, and as modified it should be affirmed, but without costs of the appeal to either party.

FREEDMAN and SEDGWICK, JJ. concurred.

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SARAH L. HUDSON, PLAINTIFF, v. REUBEN SMITH, ET AL., DEFENDANTS.

I. ESTOPPEL BY RECORD, AND *RES ADJUDICATA*.

1. A judgment in an action brought pursuant to the provisions of § 92, article 2, title 3, chap. 8, part 3, R. S., relative to charging heirs and devisees with the debts of the decedent, to the extent of the estate, interest, and right in the real estate descended to them from, or devised to them by, such decedent, to charge certain real estate with a debt due the plaintiff by a decedent, estops the parties defendant and their privies from thereafter disputing that the decedent had such estate, interest, and right in such real estate, as she was by the complaint in such action alleged, and by the decision thereof, adjudged to have.
  2. A judgment of a court of competent jurisdiction upon any fact, title, or question distinctly put in issue, or directly involved in the suit, is conclusive in any other action between the same parties or their privies, in respect to the same fact, title, or question.
- II. *Legal title, effect of implied trust upon*; see remarks of the learned judge.
- III. *Subrogation—Right of party in possession, claiming ownership to pay off a lien and claim a subrogation*; see remarks of the learned judge.

Before MONELL, Ch. J., FREEDMAN and SEDGWICK, JJ.

*Decided June 7, 1875.*

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Exceptions ordered to be heard at general term.

The action was to recover possession of a lot of land in this city.

Prior to May, 1854, Michael Burke was the owner of the lot in question. In that month he mortgaged the lot to one Quackenbush.

In June, 1855, an action was commenced to foreclose the mortgage, and a judgment of foreclosure and sale was entered December 6, 1855, which judgment was assigned to Mary J. Watson. The premises were sold under the judgment in August, 1858, bid in by, and conveyed to Mrs. Watson.

It was claimed on the part of the defendants, that the assignment to Mrs. Watson of the judgment, and the conveyance to her on the foreclosure sale, was merely nominal. That the money was furnished by her mother, Mary Lotta, to whom it was claimed the property—although *legally* vested in Mrs. Watson—in reality belonged.

In August, 1859, Mrs. Watson conveyed the premises to Yates, Porterfield & Wells. The deed was absolute on its face, and was recorded as a conveyance, and not as a mortgage; but it was executed and delivered under the following circumstances:

Mrs. Watson applied to Yates, Porterfield & Wells for a loan, and as security offered a deed of these premises. The loan was made, and the deed taken *as security*.

In the same month (August, 1859), Isabella Berrand (a daughter of Mrs. Lotta) went to Yates, Porterfield & Wells, expressing dissatisfaction with the conveyance to them, claiming that the property belonged to Mrs. Lotta, and then and there paid to them a part of the loan; and subsequently (in June, 1860) paid to them the remainder, and then demanded a conveyance by them to Mrs. Lotta of the property. No conveyance was ever given.

In 1861 or 1862, Mary J. Watson died intestate:

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and it was claimed that she was the equitable owner of the premises, subject only to her conveyance by way of mortgage to Yates, Porterfield & Wells.

Upon the death intestate of Mrs. Watson, without issue, the property, or such right and interest as she had, descended or passed to her mother, Mary Lotta (for life), with the reversion to her brother and sister—Robert Lotta and Mrs. Berrand, as her heirs-at-law.

At and previous to the death of Mrs. Watson, Mrs. Lotta was in possession of the property, and remained in possession until her own death in December, 1864.

After Mrs. Lotta's death, Mrs. Berrand had the possession, collected the rents, and exercised general acts of ownership over the property, claiming it as her own.

At the time of the death of Mrs. Watson she was indebted to Mrs. Hudson, the plaintiff in this action, to recover which she commenced in June, 1869, an action in the supreme court of this state. The action was against Isabella Berrand and Robert Lotta (among others) as the heirs-at-law of Mrs. Watson, to enforce payment out of property inherited by them from Mrs. Watson, the debtor.

The complaint in that action alleged that Mrs. Watson, "at the time of her decease, *was seized and possessed in fee* of the following real estate, namely," describing the lot in question. That the said real estate, on the decease of Mrs. Watson, descended to the defendants "Isabella Berrand and Robert Lotta, as her heirs-at-law."

A judgment was demanded against such defendants "as the heirs-at-law of Mary J. Watson," and "that the plaintiff might have execution thereof, of the before described real estate only, and not otherwise, and that as against the plaintiff and as against all persons claiming under the judgment and execution, the other

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defendants be barred of all right, title, and interest in said premises."

The summons and complaint in that action were duly served on Mrs. Berrand and Robert Lotta. Mrs. Berrand appeared in the action and answered the complaint. Robert Lotta did not appear. Mrs. Berrand, *denied* that Mrs. Watson was seized in fee of the premises, or that it had descended to her and her brother, Robert Lotta, as the heirs-at-law of Mrs. Watson.

She then set up the said mortgage from Burke to Quackenboss, the suit to foreclose same, and the recovery of a decree therein; and further that Burke requested Mary Lotta, her mother, and the mother of said Mary J. Watson, to purchase said decree, which she consented to do, and did purchase said decree for one thousand dollars; but that being old and infirm, she delivered said one thousand dollars to said Mary J. Watson, to complete said purchase and take an assignment of said decree to her, said Mary Lotta; but instead thereof, said Mary J. Watson "erroneously and inadvertently" took an assignment to herself in her own name; that interest was thenceforth, until August, 1858, paid on said decree to said Mary Lotta; that afterwards said Mary Lotta caused said premises to be sold under said decree, and they were bid in by her agent, Mary J. Watson, who "erroneously and inadvertently" took the title to said premises in her name, but who in her lifetime "never claimed or pretended to be the real owner thereof, or that she had the same in any other capacity than as agent of, and for the use, and subject to the direction and control of the said Mary Lotta, deceased, and not otherwise."

She further alleged that notwithstanding that the premises were conveyed to said Mary J. Watson, the said Mary Lotta, from the date of the sheriff's deed to Mrs. Watson to the time of her decease. was in pos-

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Statement of the Case.

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session of the premises, receiving the rents and profits; that Mrs. Lotta died in possession of the premises, leaving a last will, wherein she devised unto her (Mrs. Berrand), all her real and personal estate, under which devise she claimed to be the "sole, true, and equitable owner of the premises."

Neither of the defendants appeared at the trial. The action was tried by the court without a jury, and the following facts and conclusions were made :

That by a certain indenture dated August 13, 1858, made between James C. Willett, sheriff of the city and county of New York, of the first part, and Mary J. Watson of the second part, the said James C. Willett, as such sheriff, conveyed to said Mary J. Watson, in fee, the premises described in the complaint, and she thereupon entered into possession thereof, and that said real estate is of the value of five thousand dollars.

That the father of said Mary J. Watson predeceased her ; that said Mary J. Watson at the time of her decease left no child her surviving, but left her surviving her mother, Mary Lotta, since deceased, and one brother, Robert Lotta, and one sister, Isabella Berrand.

The following were the conclusions of law :

I. That said Mary J. Watson, at the time of her decease, was seized and possessed in fee of the premises described in the complaint.

II. That said Robert Lotta and Isabella Berrand are the heirs at-law of the said Mary J. Watson, and said premises descended to them as such heirs-at-law, to each one-half thereof.

III. That said bond remains unpaid, and that there is now due to the plaintiffs thereon, the sum of three thousand three hundred and fifty-one dollars and sixty-two cents for principal, and eleven hundred and fourteen dollars and thirty-eight cents for interest thereon, making in all forty-four hundred and sixty-six dollars.



Upon these findings a judgment was entered that the plaintiff have execution thereof, "out of the real estate in the complaint described, only, and not otherwise; and that as against the plaintiff, and as against all persons claiming under the judgment and execution the other defendants be barred," &c.

Under an execution upon the judgment, the sheriff sold the lot in question, and in August, 1871, conveyed it to Mrs. Hudson, the plaintiff.

The action was tried by the late chief justice and a jury.

Upon proof of the facts hereinbefore stated, the court directed a verdict for the defendants.

The plaintiff excepted.

Judgment upon the verdict was suspended, and the exceptions directed to be heard in the first instance at the general term.

*J. Townshend*, for plaintiff.

*H. E. Tallmadge*, for defendant.

BY THE COURT.—MONELL, Ch. J.—The sheriff's deed to Mrs. Watson, executed and delivered under the foreclosure judgment of the Burke mortgage, vested her with *legal* title to the premises. Any equity existing in Mrs. Lotta, arising from her having advanced the money to purchase the judgment, did not, of itself, divest the legal estate from Mrs. Watson (1 R. S. 728, §§ 51, 52), and her subsequent conveyance to Yates, Porterfield & Wells, although intended as a mortgage, vested them with the legal title, subject only to a defeasance upon establishing the nature of the conveyance.

It is conceded that the conveyance was as a security for a loan. Thus, in effect, the grantees became mortgagees, and the equity of redemption remained in Mrs. Watson, the grantor.

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Opinion of the Court, by MONELL, Ch. J.

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It is possible that Mrs. Lotta, being in possession and claiming to own the property, having paid the loan, had an equitable right to be subrogated to the rights and interests of the mortgagees, and could, irrespective of her claim under the alleged trust existing between herself and Mrs. Watson, have insisted upon payment of the sum by Mrs. Watson; or could have acquired the rights of the mortgagees, as the equitable assignee of the mortgage, and compelled its payment by action of foreclosure.

So again, at any time during the life and even after the decease of Mrs. Watson, the equity arising under the alleged trust could have been enforced, and the legal estate of Mrs. Watson divested in favor of Mrs. Lotta, who thereupon could have redeemed the premises from the mortgage to Yates Porterfield & Wells.

But at the decease of Mrs. Watson the *legal* title was still in Yates Porterfield & Wells with the equitable title still in Mrs. Watson. The only right or interest in Mrs. Lotta, was under an unasserted and unrecognized implied, or equitable, trust, or else under some possible right acquired by payment of the loan.

Down, therefore, to the commencement of the present plaintiff's action in the supreme court, the rights and interest of the several parties were unchanged. Mrs. Watson died, and whatever rights she had passed to her mother and brother and sister, subject of course, if she was the owner, to the payment of her debts. Mrs. Lotta was and remained in possession, claiming as owner, until her decease, when all the rights she had passed to Mrs. Berrand, as her devisee.

The theory of the action in the supreme court, was, that Mrs. Watson had seizin *in fee*, which descended to her heirs-at-law. That theory negated any seizin or other right in Mrs. Lotta, or in Mrs. Berrand, under Mrs. Lotta's will. The allegation in the complaint was to that effect, and the judgment so determined. Neither

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Opinion of the Court, by MONELL, Ch. J.

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Mrs. Lotta, during her life, nor Mrs. Berrand after Mrs. Lotta's death, asserted or attempted to assert, any of the equitable rights or interests which it was and is claimed she possessed. But having been in uninterrupted possession of the premises for some ten or more years, they seem to have deemed it unnecessary to defend their possession against the attempt to obtain payment of Mrs. Watson's debts out of their alleged inheritance.

The action in the supreme court was prosecuted under the Revised Statutes (2 *R. S.* 452, § 32), which provides that the heirs of every person who shall have died intestate . . . shall respectively be liable for the debts of such person . . . to the extent of the estate, interest, and right in the real estate which shall have descended to them, from . . . such person ; and the question which prominently presents itself, is, whether the judgment in that action, and the title made under it, is not conclusive upon Mrs. Berrand, and those claiming under her.

Judgments of courts of competent jurisdiction are conclusive, as to the parties and privies, as to the subject-matter adjudicated upon ; and such parties are estopped from afterwards litigating the same subject matter, in any form of action whatever.

So that if the *seizin* of Mrs. Watson, and the inheritance of the estate by Mrs. Berrand and her brother, as the heirs-at-law of Mrs. Watson, were adjudicated in that suit, all the parties are estopped from disputing the conclusion in any other action.

Thus in *Oatram v. Morewood* (3 *East R.* 346), it was held, that if a verdict be found on any fact or title, distinctly put in issue in an action, such verdict may be pleaded by way of estoppel in another action, between the same parties or their privies, in respect to the same fact or title.

It was necessary in the action to compel the pay-

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Opinion of the Court, by MONELL, Ch. J.

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ment of Mrs. Watson's debts, to establish her *seizin* of the property, or of some vendable or leviabie interest in it. If she had no title or interest, it could not be subject to her debts. The statute provides (2 R. S. 453, § 36), that it shall be incumbent on the creditor seeking to charge any heirs, to show the facts and circumstances therein required to render them liable. And the heir is allowed to take issue upon those facts, and it is only upon its appearing that any lands or tenements have *descended* to the heir, that such lands can be held for the payment of debts, and to create a descent there must have been a *seizin* in the person from whom the lands descended.

The statute regulating proceedings against heirs or devisees (2 R. S. 454 § 54) provides that the judgment shall direct the debt to be levied of such real estate as shall *appear* to have descended, and not otherwise; and gives it a preference, as a lien on the real estate descended, to any judgment or decree against the heir personally for any debt or demand in his own right.

This, therefore, seems to me to be a clear case of estoppel by record, shutting out the defense set up in the answer; and estopping Mrs. Berrand and her grantee from claiming title through or under Mrs. Lotta. As to that subject it was fully and directly litigated in the supreme court suit, where the only legitimate inquiry related to the *seizin* of Mrs. Watson.

Mrs. Berrand contested that question, and claimed title in herself under the will of Mrs. Lotta, setting up substantially the same facts, which she now claims constituted Mrs. Lotta's equitable title to the premises. That issue was adjudged against her, and in this action the former adjudication must be regarded as *res judicata*.

One or two citations are sufficient for the principle.

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Opinion of the Court, by MONELL, Ch. J.

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In Doty v. Brown (4 N. Y. 71), the general proposition is stated to be that the judgment of a court of competent jurisdiction upon a question directly involved in the suit is conclusive in a second suit between the same parties, depending on the same question, although the subject-matter of the second action be different.

In Castle v. Noyes (14 Id. 329), the action involved the *title* to personal property. The action was to recover its possession. One Houghton was the common source of title. The plaintiff claimed under a chattel mortgage executed by Houghton, and the defendant under a judgment and execution against Houghton. The defendant attempted to impeach the mortgage, which was met by proof of a former recovery in a suit wherein the defendant was plaintiff, and one Rurk was defendant, in which Rurk was sued for taking a part of the mortgaged property. Rurk took the property as the servant of the mortgagees, and justified under the mortgage. The *bona fides* of the mortgage was directly involved and contested in that action, and was sustained by the judgment. The court held, that the judgment was conclusive against the defendant's title in this action. The court say (p. 331) the issue upon his title is precisely the same in this suit as it was in the suit before the justice.

In this case the judgment establishing the lien upon the lands as the lands of Mrs. Watson, involving as it did, the whole question of her title, as well as the whole question of the defendant's title, is an effectual estoppel against Mrs. Berrand, estopping her from now setting up any adverse title in herself, arising from the same facts or circumstances which she had already set up in the former action, and which, in that action, had been determined against her.

In this view the plaintiff was entitled to recover. She had acquired a title under a judgment authorizing the sale of the property. The judgment was against

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Opinion of the Court, by MONELL, Ch. J.

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those now claiming adversely to it, and they are estopped by it.

As the exception to the direction of the learned justice must be sustained, it is not necessary further to inquire whether, independently of the point decided, the defendants had shown any title whatever in themselves, and, therefore, anything to weaken the plaintiff's claim under her judgment, which may always be done upon the principle, that in the action of ejectment a defendant may rely to defeat the action upon the weakness of the plaintiff's title. The evidence of any such right to or interest in the property, was certainly very slight, and probably not sufficient to affect or impair the title which the plaintiff had acquired under her judgment.

The exception to the direction of the court must be sustained, the verdict set aside, and a new trial ordered, with costs to the plaintiff to abide the event.

**FREEDMAN and SEDGWICK, JJ., concurred.**

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Statement of the Case.

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IGNACIO F. ALFARO, PLAINTIFF AND RESPONDENT,  
v. STRATFORD P. DAVIDSON, ET AL., DE-  
FENDANTS AND APPELLANTS.

**MOTION FOR A NEW TRIAL ON THE MINUTES OR A CASE.**

**THE GROUNDS ON WHICH IT IS BASED MUST APPEAR IN THE RECORD.**

*Rule relaxed on appeal.*

When there is an appeal from the judgment as well as from the order denying a motion for a new trial, and both appeals are brought in for argument at the same time, this rule is relaxed, because the court is in a position to do full and complete justice between the parties according to the exigencies of the case, and without regard to mere matters of form.

*Rule strictly enforced on appeal.*

When, however, the appeal from the order denying the motion for a new trial is brought on for argument while the appellant is keeping himself in such position, so that in case of non-success he may prosecute a further appeal from a judgment already entered, or to be entered, the rule will be strictly enforced, and the order below affirmed for the reason that the grounds on which the motion was based do not appear on the record.

Before MONELL, Ch. J., and FREEDMAN, J.

*Decided June 7, 1875.*

Appeal from order denying defendants' motion on the judge's minutes for a new trial, a verdict having been rendered in favor of the plaintiff for five hundred dollars.

*S. F. Cowdrey*, counsel for appellants.

*F. B. Coudert*, counsel for respondent.

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Opinion of the Court, by FREEDMAN, J.

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BY THE COURT.—FREEDMAN, J.—This action was brought to recover damages for the breach of a contract. At the trial both parties gave testimony, and the case was submitted to the jury under the charge of the court, and the jury rendered a verdict in favor of the plaintiff for five hundred dollars. No motion was made by the defendants for the direction of a verdict. After the rendition of the verdict, the defendants moved upon the minutes of the judge, but without assigning any grounds for the motion, that the verdict be set aside and a new trial granted. The motion was denied, and a memorandum of such decision entered in the clerk's minutes. This memorandum the defendant's counsel sees fit to term an order denying his motion. From this so-called order the present appeal is taken, and upon such appeal we are asked to review the whole proceedings, which include questions of pleading and of evidence, and questions relating to the effect and construction of contracts, to the damages given and the measure of damages, and to the refusal to charge certain requests, to none of which questions the attention of the judge below was called at the time the motion was made. The defendants have procured an order staying plaintiff's proceedings on the verdict until the determination of the present appeal.

In my judgment such practice should not be sanctioned.

The practice of bringing separate appeals from the judgment and from the order denying a motion for new trial, at different times, involving as it does the necessity of the examination of, to some extent, the same questions by different general terms varying in their composition, and consequently the possibility of a conflict of decisions in the same case, is open to so many objections, be the appeals ever so meritorious, that this court has at all times felt it to be its duty to discourage it, so far as it can be properly done.



In every case in which the pendency of both appeals is made to appear, it is customary to insist that they be argued together at the same term. When this is done, the court is in a position to do full and complete justice between the parties, according to the exigencies of the case, and without regard to mere matters of form.

When, however, but one appeal is taken, and the court is forced to entertain and determine it by itself, it is but due to the respondent, especially as long as the right to take the other appeal remains preserved, to hold the appellant to strict practice. This is especially necessary in case the appeal is from the order denying the motion for a new trial, no matter whether the motion was made at the conclusion of the trial on the judge's minutes, or subsequently at special term on a case. In every such case the record should clearly show the grounds upon which the motion was based.

In all other matters the rule is firmly established, by a long series of decisions, that the error complained of must be specifically pointed out.

In matters of evidence it is the duty of the counsel making the offer to apprise the court of the reasons which render the evidence offered material, and an exception to the exclusion of a single question, so broad and general that its materiality could not be readily seen, has never on appeal been held error sufficient *per se* to work the reversal of a judgment.

So an objection made must be accompanied with a statement of the ground upon which it is made, and, if the objection be overruled, the exception taken can be sustained upon no other ground than the one thus specified, unless the ground not stated is one that could not possibly be obviated, or unless the ruling excepted to is of a very general nature, as, for example, a direction to the jury to find for a particular party, in which case a general exception is sufficient.

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For a similar reason a single exception to a whole charge, or paragraph of a charge, any portion of which is correct, or to an entire piece of evidence, any part of which is admissible, or to a refusal to charge several propositions, any one of which was properly refused, is unavailing.

Why, then, should an appellate tribunal, on an appeal from an order denying a motion for a new trial, review the whole proceedings at the trial, when the printed case fails to show the grounds upon which the motion was based, or does show that no grounds were assigned? It is a familiar rule that the appellate court will presume nothing in favor of the party alleging error, but that, on the contrary, every reasonable intendment on questions of law as well as of fact, is to be made in support of the ruling below, and that the party who alleges error holds the onus of establishing it. But if on an appeal from an order denying a motion for a new trial this rule be disregarded, it is difficult to perceive what test can be applied to ascertain the correctness of the decision appealed from. The motion may have been denied because made on a ground which was utterly untenable. Is the appellate court to look through the entire case, pleadings, testimony and all, to discover a ground upon which it possibly might have been granted? Then, again, suppose no reasons were in point of fact given for making the motion. Can it be solemnly determined that the judge erroneously decided a question which he was not called upon to decide, and which he never considered? Such a course would be not only manifestly unfair to the judge below and unjust to the respondent, but it would also be at utter variance with the doctrine of error.

In *Joannes v. Jennings* (6 *Supreme Ct., Thompson & Cook's edition*, 138), the supreme court of the first department has recently come to the same conclusion.

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Statement of the Case.

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The fact that the case submitted fails to show upon what grounds, if any, the motion was based, being sufficient to call for an affirmance of the order, I think it best to refrain from the expression of an opinion upon the other questions that have been discussed, especially as this disposition of the present appeal leaves the defendants at liberty to re-argue all questions arising upon exceptions on the appeal from the judgment to be hereafter taken, if they should be so advised. But in conclusion it may be well to express a doubt as to whether the mere memorandum in the clerk's minutes is an order at all. The better practice would have been to enter a formal order.

The order appealed from should be affirmed, with costs.

MONELL, Ch. J., concurred.

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THOMAS H. LANDON, PLAINTIFF AND RESPOND-  
ENT, v. THE MAYOR, &c., OF THE CITY OF  
NEW YORK, DEFENDANT AND APPELLANT.

I. GOVERNMENT, CITY AND COUNTY.

1. WHO ARE NOT OFFICERS OF.

1. *The clerks of the court of common pleas are not.*

a. They are a part of the court, which is an incorporeal political being, forming a part of the judicial system of the state.

II. BOARD OF APPORTIONMENT.

1. POWER OF, UNDER CHAP. 583 OF THE ACT OF 1871.

1. The officers whose salaries it *has power to regulate*, are those who form a part of the political government of the city and

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Statement of the Case.

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county of New York, and are connected with the executive or legislative departments; *and not those who are a part of the judicial system of the state.*

*a.* Therefore the board has *no power* to reduce the salary of the *deputy clerk* of the court of common pleas for the city and county of New York.

Before FREEDMAN and SEDGWICK, JJ.

*Decided June 7, 1875.*

Appeal from a judgment entered in favor of the plaintiff against the defendants upon an order sustaining a demurrer to the answer.

The complaint alleges that the plaintiff was duly appointed a deputy clerk of the court of common pleas in and for the city and county of New York, and his salary fixed at the sum of five thousand dollars per annum.

That he entered upon and continued to perform the duties of said office to the present time, and was paid his aforesaid salary to June 1, 1871, and also from and since January 1, 1872. That for the interval—from June 1, 1871, to January 1, 1872—payment at the rate of five thousand dollars per annum has been refused, and payment at the reduced rate of four thousand dollars per annum has been made and received by the plaintiff, under protest.

And it is alleged that the reduction was illegal, and that the plaintiff is entitled to recover for said interval at the aforesaid rate of five thousand dollars.

The answer alleges that, on the 17th of May, 1871, the Board of Apportionment, pursuant to chapter 583 of the Laws of 1871, did adopt a resolution as follows:

*“Resolved,* That the salaries of all such officers and employees of the city and county government as are paid at the rate of five thousand dollars or a greater

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Opinion of MONELL, Ch. J.

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sum per annum, be reduced at the rate of twenty per cent. per annum, such reduction to apply from the first day of June to the thirty-first day of December, 1871."

That, pursuant to such resolution, the salary of the plaintiff was thereby reduced to the sum of four thousand dollars per annum for the period aforesaid.

The demurrer was to the sufficiency of the answer.

The following opinion was delivered at special term :

MONELL, Ch. J.—The sufficiency of the appointment of the plaintiff as a deputy of the clerk of the court of common pleas, and that his salary was fixed at five thousand dollars per annum, is conceded by the answer. It is also admitted that he has at all times performed the duties of the office.

The only question, therefore, is, whether the Board of Apportionment had authority, under the statute referred to, to reduce the plaintiff's salary.

The act is entitled, "An act to make provision for the local government of the city and county of New York" (*Laws of 1871*, p. 1268), and in the third section it is provided that certain officials shall meet as a board of apportionment, and shall have power, &c., . . . "to regulate all salaries of officers and employees of the city and county governments."

It is claimed that the plaintiff is not an officer of either the city or county governments, and therefore not affected by the resolutions of the board, reducing salaries by twenty per cent. of such as were then receiving five thousand dollars or upwards.

The city of New York, as a corporate or political body, consists of the mayor, aldermen, and commonalty ; and the county of New York, as a body politic, is represented by the board of supervisors. These governments—the former under ancient and modern

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Opinion of MONELL, Ch. J.

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charters, and the latter as one of the political divisions of the state—have recently been consolidated (*Laws* 1874, chap. 304), and for all governmental purposes have now become one body corporate and politic by the name of the mayor, &c.

When the act of 1871 was passed, these governments were separated, and each exercised its separate corporate functions and powers.

The general functions of government in the republic are confided to the legislative, executive, and judicial departments. The legislative department for the whole state reposes in the senate and assembly; for districts and portions of the state in boards and supervisors; and in cities and villages in local boards of councilmen and trustees. In the political division of the state, the functions of these boards are confined to the interests and territory for which they are created. The people of another or adjacent territory, have no interest in their acts, and can not be affected or prejudiced by them. The supervisors of a county, and the aldermen or trustees of a city or village, must legislate for their own counties, cities, or villages; they can not legislate for other counties, cities, or villages. They are merely *local* legislators, confined and prescribed in their powers, in whose acts their immediate constituency are interested.

So with the executive department, for the state at large, it is vested in the governor; but, in the political divisions of the state, it is to some extent delegated to certain ministerial or *quasi* executive officers, who, within prescribed limits or divisions, exercise some of the executive power. Their functions are restricted, and their powers confined to parts only of the state. The people at large have no interest in, nor are they affected by the acts of such officers.

Officers appointed or elected to administer the local divisions of the state, whose functions are limited to

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such divisions, are local officers, as distinguished from the class whose powers, for some or all purposes, extend throughout the state ; and they as the agents of the people, are the local government. In counties they are the government of the county ; in cities, the government of the city ; and for the purpose of local government, their acts, subject only to the higher legislative or executive control, are of force in such divisions, but not elsewhere.

Local governments have always been confided to local officers ; and although public officers, whose powers extend over the state, may exercise their powers anywhere in the state, they are not a part of the local government, but only a part of the general government of the state, which includes the separate divisions of the state.

The senate and assembly may legislate for the city or the county of New York ; may constitute the agencies for their local government, and prescribe and fix the limits of their powers.

But the senate and assembly is not the local government of the city or county. It is merely a power to create such local government, and not such government itself.

There is a clearly defined distinction between general and local government. The local may be, and doubtless is, included in the general, to the extent that the latter may create the agencies to administer the former. But to that extent only does or can the general government, which resides in the whole people, administer the local government.

Under the agencies thus created, and under them alone, does the local government administer the government.

If, therefore, local governments are administered by local officers, created for the purpose, and with power to administer them, then it necessarily follows that

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public officers, whose functions extend beyond local territories, are not a part of local governments.

The judicial department is a part of the general government of the state. It forms no exclusive part of any of the political divisions of the state. It administers its functions for the people at large, and except in some cases, is unlimited in its jurisdiction.

The court of common pleas is a part of this judicial system ; and although there is a territorial limitation to its jurisdiction, and a certain degree of *locality* in its organization, it, nevertheless, is not dissevered from the general judicial department of the state. It administers the law for all the people, and is not confined to the constituency of a particular district. For I do not understand that the territorial restriction in the execution of process of a certain kind, and in certain cases, has yet been held to confine its jurisdiction, when it had acquired it in other cases, extending beyond the territorial limit. The constitution recognizes it as a part of the entire judicial system, and as part of the general government ; and as it is not restricted exclusively to a local or political division of the state, it forms no other part of the local government of the city or county than does the supreme court, when, as another part of the judicial system, it exercises its powers and jurisdiction within the same territory.

The judges of this court are among the class of judicial officers who are denominated public *officers of the state* (1 R. S. 95, § 1). If such officers are with functions, which, at least for some purposes, extend over the state, then they are not necessarily county or city officers, but officers of the state, and a part of the state judiciary.

In the case of *Day v. Buffington* (11 Int. Rev. Rec. 205), which was an action to recover a tax imposed by congress upon a judge's salary, the plaintiff was a judge of probate for a county in Massachusetts. The



court recognizing the vesting the powers of government in the three departments—the legislative, executive, and judicial—held the judge of probate was a state and not a county officer; and the supreme court of the United States, in reviewing that decision (11 *Wallace*, 113), say that the judges are one of the means and instrumentalities for administering the government of a state. Judge NELSON says (p. 126), the question is whether the power to levy and collect taxes enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws.

In *Freedman v. Segel* (10 *Blatchford*, 327), it was attempted to distinguish *Day v. Buffington* (*supra*), on the ground that the salary in the former was payable out of the city, and in the latter out of the state treasury. But Judge SHIPMAN says: "In both cases the judges exercise the judicial authority of the state, and represent its sovereignty in that behalf. The payment of salaries out of local treasuries did not localize the courts. To assent to such a proposition would be to maintain that the sovereign power of a state depends upon the manner in which it exercises its discretion in the details of its administration and the distribution of its public burthens."

The plaintiff in *Freedman v. Segel* was a judge of the superior court of this city, a court no less local than the common pleas. Of that court Judge SHIPMAN says: "It is clothed with no inconsiderable part of the general judicial power of the state, with more or only partial limitations as to the subject-matter of litigation."

In *Quin v. the Mayor, &c.* (44 *How. Pr.* 266), the action was to recover the plaintiff's salary as a judge of one of the district courts of this city. In examining the act of 1871, as authorizing the board of apportion-

## Opinion of MONELL, Ch. J.

ment to regulate salaries of the officers of the local government, Judge FANCHER says: "It may be questioned whether the officers thus referred to include judicial officers. *The term certainly does not include state officers*, who derive their office from the general laws of the state, and whose duties are not by law limited to the city and county of New York." This case was affirmed by the court of appeals upon the opinion of Judge FANCHER (53 N. Y. 627).

It is quite clear, I think, that the officers whose salaries were brought within the regulating power of the board of apportionment, were intended to be such as formed a part of the *political* government of the city and county, and who were connected with the executive or legislative departments, and not such as were a part of the judicial system of the *state*; otherwise, the legislature would not have limited it to officers of the *government*, but would have extended it to all officers whose salaries were paid out of the city or county treasury. But the limitation to the officers of those *governments* indicates sufficiently that it was not intended to cover officers of the state.

The deputy clerk of the court of common pleas is appointed by the clerk, who receives his appointment from the *court* (*Laws* 1847, ch. 255, § 7), and is the custodian of its records and seal. He is a part of the incorporeal political being, which requires for its existence the presence of judges and a clerk.

Therefore, if the court itself, or the judges of the court, are not within the act, it follows that neither the clerk nor his deputy is, or can be, affected by its provisions.

A careful examination of the subject has satisfied me that the plaintiff is not, and was not, an officer of either the city or county governments, and therefore that the board of apportionment had no authority to reduce his salary.

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Appellants' points.

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The plaintiff must have judgment upon the demurrer, with costs.

*E. Delafield Smith*, counsel to the corporation, and *D. J. Dean*, of counsel for appellants, urged :—The defendants argue, that the plaintiff is an "officer or employee of the city and county of New York." He is the deputy of the clerk of the court of common pleas, appointed by the clerk of that court, pursuant to Sec. 1 of ch. 198, Laws of 1854. The court of common pleas is a local court, through which the judicial authority of the state is administered within a designated locality. The judges of the court are public officers of the state ; but the clerk and his deputies are not the depositaries or ministers of judicial power. Their duties are purely local, and concern only the government of the city and county of New York. The plaintiff, therefore, administering the duties of a local administrative office, within the city and county of New York, and receiving a salary from the treasury of the city and county of New York, is an officer thereof ; and is comprehended within the intent and the letter of the statute, authorizing the board of apportionment to regulate all salaries of city and county officers.

*Elliot Sandford*, attorney and of counsel for the respondent, urged :—I. Section three of chap. 583, Laws 1871, does not give the board of apportionment power to reduce the plaintiff's salary, because the office of deputy clerk of the court of common pleas is neither a city office nor a county office. The charters of the city enumerate the city departments and the city officers, but they contain no allusion to the office held by plaintiff, or to the court of which he is an officer (44 *How.* 266 ; 53 *N. Y.* 627 ; 2 *Dillon on Corporations*, § 772).

II. The office held by plaintiff is a state office, and

## Respondent's points.

he is a state officer (Opinion of FREEDMAN, J. in *Jarvis v. The Mayor, &c.*, reported in "Register," April 21). The court of common pleas was re-created and reorganized, by a special and separate act, in 1821, and, by subsequent statutes, vested with general jurisdiction in law and equity. Any person in the state may be plaintiff. The only restriction on its jurisdiction is, that defendant must reside, or be served with process, in the city of New York. To remove all doubts, general power and jurisdiction were given in 1854 (*History of the court by Chief Justice Daly*, 1 *E. D. Smith*, lxxx. 3 *Daly*, Appendix). By the Revised Statutes (1. *R. S.* § 95) the judges and clerk of this court are classed as judicial officers, under the title of "public officers of this state, other than militia" (ch. 5, title 1, part 1).

III. State officers are not necessarily those whose duties extend over the whole state (*Greaton v. Griffin*, 4 *Abb. N. S.* 310; *Russell v. The Mayor*, 2 *Denio*, 472, 481, 483; *Healey v. Dudley*, 5 *Lans.* 115, 122; *People v. Conover*, 17 *N. Y.* 64, 67; *Hayner v. James*, 17 *N. Y.* 316).

IV. The title of the act, ch. 583 is, "the act to make provision for the local government of the city and county of New York." The court of appeals decided in the case of *Smith v. The People* (47 *N. Y.* 330), what the words "local government of the city of New York" mean. Judge ALLEN says (p. 337), speaking of the title of chap. 137, Laws 1870, which is "an act to reorganize the local government of the city of New York," and known as the charter of 1870: "The title of the act is local, relating solely to the *political* organization of the city. It does not indicate an intent to reconstruct or interfere with the organization of the criminal courts of the city, and the act in all its provisions adheres to the title." The same principle is laid down in *Huber v. The People* (49 *N. Y.* 132). Section 9 of chap. 382, Laws of 1870—the county tax

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levy—making further provisions for the government of the county of New York, giving power to the comptroller to appoint and remove *attendants on courts*, has been declared void by two general terms of the supreme court, because in violation of the local act clause of the constitution (*Brennan v. The Mayor, &c.*, not reported; *Opinions by INGRAHAM, P. J., and BRADY, J., 47 How. 178*). It is obvious, therefore, that the words “local governments of the city and county of New York” do not include the courts.

*Per Cur.*—The judgment is affirmed, with costs, upon the opinion delivered by Judge MONELL in the case at special term.

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CAROLINE POLLOCK, PLAINTIFF AND APPELLANT, v. MATTHEW T. BRENNAN, SHERIFF, &c., DEFENDANT AND RESPONDENT.

I. SHERIFF—TRESPASS AGAINST FOR LEVYING ON GOODS CLAIMED TO BE OWNED BY A. UNDER AN EXECUTION AGAINST B.

1. EVIDENCE AS TO OWNERSHIP.

a. Proof that A. bought the goods of H. at a time when he was sole owner thereof, is *not decisive on the issue of A.'s ownership*.

1. If A. in fact acted on behalf of B. in making the purchase, then A. would not be entitled to recover.

b. Proof that A. had means and B. had none, is *admissible*.

1. *Questions in different forms* tending to show these facts are proper.

c. PROOF AS TO WHO WAS IN POSSESSION.

1. Proper on the question of ownership.

1. *Question designed to call out such proof.*

The deputy-sheriff who made the levy was asked, “if he

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saw anybody that was in charge of the place at the time he went to levy?" the question was *correctly allowed* under a general objection.

*Answer.*

The witness answering that he judged the plaintiff's husband was in charge, not being objected to, *does not render* the allowance of the question or the reception of answer, error.

2. *Res gesta.*—The defendant having called out the fact that plaintiff's husband was in charge, *plaintiff was entitled to have* from the witness who testified to that fact, *testimony* as to what was said at the time.

## II. NEW TRIAL.

### 1. MOTION FOR ON THE EVIDENCE.

#### 1. Cause for denying.

- a. That the party did not call the *attention of the court* to his claim that the weight of the evidence as matter of law called for a verdict in his favor is sufficient cause.

## III. OPINIONS NOT IN THEMSELVES ADMISSIBLE.

1. Where a witness *gives to a question, the allowance of which is not error, an answer* which is responsive, but which merely states his *opinion* on the subject-matter inquired of, and *no objection is taken* to his answer, there is *no error* calling for a reversal.

## IV. TRIAL—CONDUCT OF.

### 1. SUSTAINING OBJECTION URGED IN THE MIDDLE OF A QUESTION.

- a. *Not error where* the reason for the exclusion does not appear, and the counsel does not claim the right to complete.

1. A substantial reason growing out of the usual incidents of a trial, must be presumed to exist.

### 2. REMOTE EVIDENCE.

- a. Error can not be assigned on this ground under a general objection to the reception of evidence, the subject-matter of which is pertinent to the inquiry.

1. A *special objection* must be made based on the ground of remoteness.

### 3. UNIMPORTANT TESTIMONY.

- Exclusion of is not cause for reversal, although the inquiry is pertinent.

Before MONELL, Ch. J., FREEDMAN and SEDGWICK, JJ.

*Decided June 7, 1875.*

Appeal from judgment upon verdict.

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Opinion of the Court, by SEDGWICK, J.

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*Samuel Hirsch*, attorney, and of counsel for appellant.

*Brown, Hall & Vanderpoel*, attorneys, and *Mr. Green*, of counsel for respondent.

BY THE COURT.—SEDGWICK, J.—The exceptions are of a kind that does not require a detailed statement of the facts. The action was to recover possession of personal property, belonging, as alleged, to the plaintiff. The property was taken under an execution issued against the property of Adolph Pollock, the plaintiff's husband. When the case went to the jury, there was sufficient evidence to require their verdict as to whether, although the property was nominally owned by the plaintiff, her husband was not in fact the true owner. It was not decisive of this issue, that she bought the business from Hoffman, at a time when he was sole owner. If she, in fact, acted in that transaction in behalf of her husband, she was not entitled to recover in this action. On the merits, then, the motion for a new trial was correctly denied. In addition, the plaintiff let the case go to the jury without directing the attention of the court to her claim that the weight of the evidence, as matter of law, called for a verdict in her behalf. This was tantamount to consenting that the jury should pass upon the facts, and prevents a subsequent motion for a new trial on the evidence. We have said, in substance, that the judge properly submitted the case to the jury.

The deputy-sheriff who levied upon the property was asked, "if he saw anybody that was in charge of the place at the time he went to levy?" The court correctly allowed this question, on the general objection of the plaintiff. The question called for testimony as to who was in possession and control of the property. These *indicia* of ownership were relevant facts.

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Opinion of the Court, by SEDGWICK, J.

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The answer was, that witness judged the plaintiff's husband was in charge. This was not objected to by plaintiff's counsel, who might have deemed this answer less hurtful than the particular acts on which the opinion was based.

The defendant having called out this fact, I think the plaintiff was entitled to have in testimony what was said at the time by her, both, because as urged by the learned counsel for appellant she was entitled to show she was not estopped by standing silent in the presence of what defendant claimed was an apparent ownership of her husband, and also because, as I think, anything she said was to be considered by the jury in ascertaining what was the correct inference to be drawn from the husband's acts or words, which, according to defendant's theory, showed he had charge of the property. Such were the views of the learned judge at the trial, for against defendant's objection he permitted a preliminary question—"Did she say anything at the time to you?" The answer was, "She said a good deal that I don't remember; she was quite agitated, and said a good deal." There appears in the case, that the counsel for plaintiff then said to the witness, "Now, among the good deal that she said, will you please tell this jury whether or not she then said"—? An objection to this was sustained. There does not appear to be any error here. The question in this maimed condition did not call for answer at all. Nor can we presume, against the presumption in favor of the validity of the judgment, that the court meant to shut out any relevant declaration of the plaintiff. We must suppose that there was a substantial reason, growing out of the usual incidents of a trial, which led the court to stop the counsel in the midst of the question, inasmuch as the counsel did not claim a right to complete it.

The defendants claimed, or it was within the scope



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of the claim they made, that the plaintiff did not buy the business, and that any money used in it belonged to the husband and not to her. Therefore it was right to admit the questions in different forms that tended to show that the plaintiff had no money, but that her husband had means. As to those questions, which it is now argued referred to remote times, there should have been special objections, that called the attention of the court to the specific point. This not being done, the ruling of the court was only as to the general pertinency of the subject-matter of the inquiry.

The defendant placed on the stand a creditor of plaintiff's husband, who testified on direct examination as to the state of accounts between them, and as to property in possession of plaintiff's husband shortly before the plaintiff made her alleged purchase from Hoffman. On cross-examination he testified he sued the husband for five hundred and thirty-four dollars. Plaintiff's counsel then asked, "And did you recover in that action a judgment of sixty dollars?" On defendant's general objection, this was excluded. This objection did not call for the exclusion of the proposed evidence as secondary. The matter aimed at was pertinent, but I think there is an error of printing, which prevents a reversal on this sole ground as well, because, although pertinent, the matter was unimportant. The error I allude to, is that of the printed book, setting out that the witness testified that he sued for five hundred and thirty-four dollars. On the direct examination, the witness said that at the time in question, the indebtedness was in fifty-three dollars and three cents. If this error does not exist, the plaintiff had full advantage of the fact that the witness sued for five hundred and thirty-four dollars, when fifty-three dollars and three cents were owed, and the only importance of the judgment would be to show what the fact was.

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I am of opinion that the judgment should be affirmed, with costs.

MONELL, Ch. J., and FREEDMAN, J., concurred.

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WILLIAM P. POWERS, ADMINISTRATOR DE BONIS  
NON, &c., PLAINTIFF AND RESPONDENT, v. WIL-  
LIAM HUGHES, ET AL., EXECUTORS, &c., OF  
THOMAS KIVLIN, DECEASED, DEFENDANTS AND  
APPELLANTS.

1 BILL OF PARTICULARS.

1. WHEN NOT ORDERED.

In an action where the ordering of a bill of particulars is a matter of discretion, one will not be ordered where, for anything that appears, the *defendant is as well acquainted* as the plaintiff with the nature and particulars of the claim, *and has all the knowledge* necessary for him to prepare an answer to the complaint in the form as pleaded.

THUS : In an action brought by an administrator *de bonis non* of P. against the executors of the agent of the administratrix of P. (which administratrix was also deceased) for an accounting of the assets of P., and the proceeds thereof remaining in the hands of such agents at the time of his death, and for the delivery and payment over thereof, the defendants moved upon the complaint and an affidavit of their attorney for a bill of particulars ; the complaint alleged that the agent at the time of the death of the administratrix had in his possession a large amount of assets, the property of P., which he had collected and received as agent of the administratrix ; that at the time of the death of said agent, the said assets and proceeds thereof, which he had received and collected as before stated, remained in his hands unaccounted for ; the

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affidavit averred that the defendants were ignorant of the particulars of the claim, and that it was necessary and material to their defense, and to enable them to answer, that they should have a bill of particulars.

*Held,*

*A proper exercise of discretion to refuse an order for a bill of particulars.*

Before FREEDMAN and SEDGWICK, JJ.

*Decided June 7, 1875.*

Appeal from order denying motion, by defendants, for bill of particulars.

The complaint alleges that Ann Powers was appointed administratrix of the estate of William P. Powers, deceased; that she appointed Thomas Kivlin to be her agent in the care and management of the goods, chattels, and credits of said William P. Powers, deceased; that said Kivlin, as such agent, "took the entire charge and management of the goods, chattels, and credits of said William P. Powers, collected all moneys due said estate, and also as such agent assumed to collect, and did collect, the rents of certain real estate of which said William P. Powers had died seized;" that said Ann Powers died leaving a large portion of the estate of said William P. Powers, deceased, unadministered; that the present plaintiff was appointed administrator of the goods, chattels, credits, and effects which were left unadministered by said Ann Powers: that Thomas Kivlin, as said agent of Ann Powers, as aforesaid, had at the time of her death in his possession a "large amount of assets, the property of the estate of the said William P. Powers, deceased, which he had collected and received as such agent." That said Thomas Kivlin died, leaving a will appointing the defendants the executors thereof; that said Thomas Kivlin at the time of his death had not accounted for the property of the estate of William P.

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Statement of the Case.

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Powers, deceased, which he had collected and received. as before stated, and that the defendants although requested, "neglect and refuse to account with the plaintiff for the unadministered assets of the estate of said William P. Powers, deceased, so remaining in the hands of said Thomas Kivlin, deceased." Wherefore the complaint prayed "that an account may be taken of such assets and proceeds remaining in the hands of Thomas Kivlin, deceased, and which form a part of the unadministered estate of said William P. Powers, deceased, and for a decree for the delivery over and payment to plaintiff" as administrator, &c.

The defendants, before answering, moved for a bill of particulars of plaintiff's claim on the summons and complaint, and on an affidavit which stated that the defendants intend to defend the action in good faith, but are ignorant of the particulars of said claim; that they have not answered said complaint; that it is necessary and material to their defense, and to enable them to answer, that they shall have said bill of particulars."

The motion was denied; the following opinion being delivered at special term:

CURTIS, J.—The plaintiff brings a suit in equity, asking for an accounting by the executors of a deceased agent, who it is claimed, in his lifetime, received rents and moneys which he did not account for. If the plaintiff shows at the trial facts that entitle him to an accounting, then the account must be taken and stated. At this stage of the suit, the evidence respecting the alleged acts of the agent will be taken, and usually before a referee appointed to take and state the account.

The defendants apply for a bill of particulars of the plaintiff's demand.

In this case, it is a matter of discretion whether one should be ordered or not. For anything that appears,

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Appellants' points.

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the defendants are as well acquainted as the plaintiff with the nature and particulars of the claims, and have all the knowledge necessary for them to prepare an answer to the complaint in the form it is pleaded. The effect of a bill of particulars would be to limit the testimony, and consequently the accounting and the recovery to the matters stated in the bill.

If the view contended for by the defendants is correct, it would result, that in every case when a party sought an accounting in equity from an agent who had defrauded him, there would be no remedy unless he could state in a bill of particulars accurately every item which the agent had withheld. This would defeat the remedy and leave the principal unable to sustain his claim against the agent who had embezzled and misappropriated the funds he had employed him to collect. I think the views expressed in the opinion in *Blackie v. Neilson* (6 *Bosw.* 681), must control in determining this question.

The motion is denied, with costs to plaintiff to abide the event of the suit.

*John McKeon*, attorney and of counsel for appellants, urged :—I. The complaint in this case is in fact an action for money had and received by Thomas Kivlin in his lifetime as agent of the deceased (William Powers).

II. The complaint does not show facts of an equitable nature. There are no allegations of a fiduciary character of the deceased ; no allegations of mutual accounts ; or of a series of transactions between the parties ; or of voluminous or intricate accounts between the parties. The complaint does not even pray for discovery. It is not every account which will entitle a court of equity to interference, and every agency does not authorize the filing a bill in equity (*Maxon v.*

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Respondent's points.

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Bright, *L. R.* 4 *Ch. App.* 292; *Towle v. Lamason*, 5 *Pet.* 495).

III. The case of *Young v. Demott* (1 *Barb.* 30), and *Blackie v. Neilson* (6 *Bosw.* 681), are not in point to sustain the decision of the justice. In the present case, the affidavit of defendants is in no manner denied or explained, as in the case of *Blackie v. Neilson*. Even in that case, the court say, that the necessity of giving the bill of particulars must appear by the moving papers, and by that the discretion of the court must be regulated. Our moving papers show this necessity, and they are not denied.

IV. The defendants having shown, by their affidavit, the necessity of this bill of particulars, for the purpose of framing their answer, and they acting as trustees of the estate of a deceased party, every facility should be afforded them by the court in getting at all the facts in plaintiff's possession. The plaintiff does not set up that he can not give the information.

V. Under the code, the defendants have a right to a bill of particulars (*Tilton v. Beecher*, *How. Prac. Rep. Jan. No.* 1875).

*Ambrose Monell*, attorney and of counsel for respondent, urged:—I. A bill of particulars is not ordered as a strict legal right, but is a matter resting in the sound discretion of the court, except in those cases where the cause of action alleged in the pleading is an account against the adverse party, the items of which have not been set forth in the pleading (*Fullerton v. Gaylord*, 7 *Robt.* 551).

II. Where, from the nature of the action, the knowledge of the facts on which the plaintiff's claim rests, is more with the defendant than with the plaintiff, the latter will not be required to furnish a bill of particulars (*Young v. De Mott*, 1 *Barb.* 30; *Blackie v. Neilson*, 6 *Bosw.* 681).

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Opinion of the Court, by SEDGWICK, J.

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III. The office of a bill of particulars is to prevent a surprise upon the trial, and not to furnish evidence, and in the present case no surprise can befall the defendants, because they are, or should be, in possession of knowledge of all the transactions of Kivlin, whose executors they are (*Drake v. Thayer*, 5 *Robt.* 694).

BY THE COURT.—SEDGWICK, J.—Under section 158 of the code of procedure, the defendants were not entitled to a bill of particulars as a matter of right. Although the complaint averred, that the defendant's testator had collected money belonging to the estate of William P. Powers, deceased, the action was not to recover damages as such, for the withholding of that money. The demand was that the money so collected and the other property be accounted for. The result might give the plaintiff substantial benefits to which they would have a right, other than a mere money judgment. If, however, they could show that not only money was withheld, but also personal chattels, they would have a right to a judgment of a mixed character. As the action was not upon an account, as such, the right to particulars of plaintiff's claim was not absolute. There is no doubt that the learned judge had the power, if the case called for it, to direct the plaintiff to give the particulars. We are satisfied, however, that he used a sound discretion in refusing it, and adopt the observation which led him to that result. It would not have been consistent with a due regard to the rights of the distributees of the estate of the plaintiff's intestate to cause those rights to depend upon the ability of the plaintiff to specify, *in presenti*, what was the particular thing or sum it was claimed the defendants should deliver or pay.

We can not examine the complaint, as if a demurrer had been pleaded, nor can we look to find if any of its allegations are indefinite or uncertain except

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Opinion of the Court, by FREEDMAN, J.

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as respects the defendant's motion for particulars. Until the defendant demurs or makes his motion, the objections appropriate to these proceedings are not to be considered. We must now deem that the complaint sets out a basis for the plaintiff's demand, that the defendants account for the property alleged to have been received by Kivlin, as agent of Mrs. Powers. The plaintiff's rights will depend then upon the result, at present unknown, of that accounting.

We do not see that the defendants are in danger of having judgment against them because of their having no knowledge, as they have not, of the facts set out in the complaint. Indeed they might be in the same predicament if the plaintiff gave an ample bill of particulars. The course of practice in such a case permits of a proper adjournment, after the cause has reached a stage which discloses that the defendants are properly charged by the plaintiff. If tried by the court, there is no reason to suppose that these executors will not have the time necessary to examine or meet any evidence of facts as to which they could have had no original knowledge or information after the use of due diligence. If it be proper, a reference may be ordered as to all or a part of the issues. A bill of particulars was not, I think, necessary to the executors for the purpose of answering. For that, it was enough to aver that they had no knowledge or information sufficient to form a belief as to the allegations of the complaint.

The order should be affirmed, with ten dollars costs.

FREEDMAN, J., concurred.



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Statement of the Case.

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CLARENCE H. SMITH, SURVIVING PARTNER OF  
ISAAC H. SMITH & SONS, PLAINTIFF AND RE-  
SPONDENT, v. THOMAS RYAN, DEFENDANT AND  
APPELLANT.

I. LIMITATIONS—STATUTE OF.

1. PROMISSORY NOTE OF A THIRD PARTY, PAYABLE AT A FUTURE TIME, ENDORSED AND DELIVERED BY THE DEFENDANT IN PAYMENT OF, OR AS SECURITY FOR, A PART OF HIS INDEBTEDNESS.

a. *As of what time it operates to take the case out of the statute.*

1. It so operates as *of the day of its delivery* to the creditor,

and

*not as of its payment.*

b. PRINCIPLE OF THE DECISION.

A payment on account, or a transfer of a security as collateral security on account, operates to take a case out of the statute only by reason of a promise implied from the act, to pay the balance. Such a promise can be implied only from the act of the debtor himself or his authorized agent. In the case at bar, the only act done by the defendant was the transfer of the notes—the payment of them at maturity by the makers was not the act of defendant or of his authorized agents. The payment by the makers was not made as agents of the defendant, but in discharge of their principal debt, pursuant to their legal obligations.\*

Before MONELL, Ch. J., FREEDMAN and SEDGWICK, JJ.

*Decided June 14, 1875.*

Appeal from a judgment.

The action was to recover a balance of an account

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\* Whether a note made by the makers for the accomodation of the defendant, and so as that between them the makers were sureties, and the defendant was principal, would have a different effect, was not considered or determined.

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Appellant's points.

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for goods sold, &c., for which the defendant was indebted April 10, 1868.

The defense was the statute of limitations. On April 14, 1868, the defendant endorsed and delivered to the plaintiffs two promissory notes of five hundred dollars each, made by Betts & Gay, dated April 6, 1868, and payable in two and five months, with interest. The notes were secured by a chattel mortgage made by the makers to the defendant, which he assigned to the plaintiffs.

Upon the receipt of the notes from the defendant they were entered in the books of plaintiff's firm by charging them to bills receivable, and crediting them to the defendant's account.

Upon the maturity of the notes respectively, the principal and interest thereon for two and five months respectively, were paid to the plaintiff's firm, and the sums collected for principal thereon were carried to the credit of bills receivable, upon their books, five hundred dollars on June 9, 1868, and five hundred dollars on September 17, 1868.

The last item proved in the mutual account between defendant and the plaintiff's firm, was the receipt, in September, 1868, of the amount of the note of Betts & Gay, for five hundred dollars, and interest thereon for five months.

The action was commenced on June 5, 1874, within six years after the said last item of the said account between the defendant and plaintiff's firm.

The action was tried by a referee, who, upon finding the foregoing facts, gave judgment for the plaintiff.

The defendant appealed.

*Lockwood & Post*, attorneys, and *James B. Lockwood*, of counsel for appellants, urged:—I. The referee erred in finding that the account between the appellant and respondent was a mutual, open, and

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Appellant's points.

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running account, such as is excepted from the operation of the statute of limitations by section 95 of the code. (1) There is no evidence in the case to sustain such finding, and an inspection of the account upon which this suit is founded, at the end of the printed case will show to the court that it does not come within section 95. The English statute (21 *James I.*) left no doubt upon this question. It excepted "such accounts as concern the trade of merchandise, between merchant and merchant, their factors or servants" (*Cotes v. Harris*, *Bull. N. P.* 149). In the revised statutes before the adoption of the code, the language was as follows: "In all actions of debt, account or assumpsit brought to recover any balance due upon a mutual, open, and current account, the cause of action shall be deemed to have accrued," &c., and the decisions of the courts followed the English statute in construing it (*Coster v. Murray*, 5 *Johns Ch.* 522; *Kimbell v. Brown*, 7 *Wend.* 322; *Edmondstone v. Thomson*, 15 *Wend.* 544; *Hallock v. Losee*, 1 *Sand.* 220; *Palmer v. The City of New York*, 2 *Sand.* 318). In section 95 of the code, the words "where there have been reciprocal demands between the parties" have been added, so that there can be no doubt as to the nature of the account to be excepted from the statute of limitations (*Peck v. The N. Y. & Liverpool U. S. Mail S. S. Co.*, 5 *Bosw.* 226). See also *Ingraham v. Sherard* (17 *Serge & Rawle*, 347). (2) The referee also erred in finding that the payment of the five hundred dollars by *Betts & Gay* in September, 1868, constituted the last item in the account. The last credit in the appellant's account was the credit for the two notes on April 14, 1868. The credit given for the proceeds of the two notes was made in another account called "bills receivable." The only relation it bore to the account of the appellant is shown by the testimony of respondent's book-keeper who says: "Mr. Ryan's

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Appellant's points.

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account showed no credit for Betts & Gay's notes after April 14, 1868 ; if they had not been paid at maturity they would have been charged back to his account ; that is what I meant by saying the bills receivable account was connected with the defendant's account."

II. If it be held that this is an item in the account, and that the account comes within section 95 of the code, still it does not affect the appellant. The principle that in a mutual, running account the cause of action accrues from the time of the last item proved in the account, is based upon the theory that the item within six years is an admission of an unsettled account and equivalent to a new promise (*Catling v. Skoulding*, 6 *T. R.* 189). That the admission must be made and the new promise given by the debtor or his authorized agent, is well settled. It follows, also, that the payment, or the demand, or whatever constitutes the item in the account from which the new promise is inferred, must be the act of the party himself or of some one authorized to make a new promise for him (*Harper v. Fairly*, 53 *N. Y.* 442). In this case the payment of the item by Betts & Gay without the privity of the appellant, was not an act from which his (appellant's) new promise could be inferred.

III. The only question in this case is this—has the appellant made a payment within the six years previous to the commencement of this action on account of his indebtedness to the respondent, or done any act which the law recognizes as an admission of the debt and a new promise to pay it. (1) The evidence shows that the last act of the appellant in respect to his indebtedness was in April, 1868, when he delivered the two notes of Betts & Gay. It is immaterial whether or not the notes were received as payment—their delivery in April followed by their payment, constituted a payment in April as between the debtor and creditor, and the statute began to run from that time (*Turney v.*

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Respondent's points.

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Dodwell, 3 *Ell. & B.* 135; Irving v. Veitch, 3 *M. & W. R.* 90; Gowan v. Forster, 3 *Barn & Ad. R.* 507). (2) We have seen above the reason of the rule that payment on account of an antecedent debt restrains the operation of the statute, viz., from the act of payment an admission of the indebtedness is inferred as well as a promise to pay. We have seen also that the payment from which the admission and promise are inferred, must be made by the debtor himself, or his authorized agent (*Harper v. Fairly, supra*). Is the payment, then, by a third party of his note to the creditor, without the debtor's knowledge, such a payment by the debtor as to constitute an acknowledgment and revive the debt? Here the third parties' notes were given by the debtor to the creditor in April, and were paid by the makers in June and September, without the knowledge of the debtor. If the notes had never been paid, there can be no doubt that the acknowledgment was in April. How, then, can the payment of the notes without the privity of the debtor change the principle? If the appellant has made any acknowledgment of his indebtedness, it was when he delivered the notes to the respondent in April, 1868. This was more than six years from the commencement of the suit, and the debt is therefore barred by the statute.

*George W. Van Slyck*, of counsel for respondent, urged:—I. The payment by the defendant to plaintiff's firm by the transfer before their maturity of the two notes of Betts & Gay, is to be reckoned from the date of the maturity of the notes, and not from the time of the delivery. The notes were given on a precedent debt, and the presumption is that they were not given or received as payment but as collateral (*Noel v. Murray*, 13 *N. Y.* 168; *Gibson v. Toby*, 46 *Id.* 640; *Vail v. Foster*, 4 *Id.* 312). This presumption of law was not rebutted nor did the defendant attempt to rebut it.

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Respondent's points.

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The notes were endorsed by the defendant, which established affirmatively that they were not given as payment (*Whitbeck v. Van Epps*, 9 *John.* 408; *Breed v. Book*, 15 *John.* 241; *Darnell v. Morehouse*, 45 *N. Y.*, pp. 64 and 71). By the contract of endorsement the defendant was liable on the notes if they were not paid at maturity, and the plaintiff not guilty of laches. A guaranty even of a note by a debtor, though void by the statute of frauds is evidence that the note was not taken in payment (*Murray v. Hoff*, 5 *Denio*, 360). The notes being held, then, as collateral security, payment should be reckoned from the time of their respective maturity and not from their delivery. The term "payment," in its legal import, means the satisfaction of a debt, and in no sense could it be said that the debt was satisfied until the notes were paid. Again the taking of the notes suspended the right of action as to the one thousand dollars until their maturity, but if they were not paid the plaintiff could have returned them to the defendant and resorted to the original demand (*Van Epps v. Dillaye*, 6 *Barb.* 24; *Fowler v. Clearwater*, 35 *Barb.* 149). The notes operated only as an extension of credit to their maturity if not paid.

II. If the notes were given in satisfaction of the debt, the date of the payment is to be reckoned from the date of payment of the notes, provided they are paid at maturity, or within a reasonable time thereafter (*Fowler v. Clearwater*, 35 *Barb.* 143; *Whipple v. Blackington*, 97 *Mass.* 473; *Chapman v. Boyce*, 16 *N. H.* 237; *Haven v. Hathway*, 20 *Me.* 347). In the above cited case of *Whipple v. Blackington*, the debtor gave note of third person, which was then over due, and the note was afterwards partly paid. The case of *Harper v. Fairly* (53 *N. Y.* 442), was cited before the referee, and is relied on by the defendant to establish his defense. It is submitted that that case is clearly distinguishable from the case at bar. In that case the

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Respondent's points.

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note of a third person was not paid to the creditor until several years after its maturity. The opinion in that case holds that a continuing agency will not be presumed to exist on the part of the maker of the note for years after the maturity of the paper so as to bind the debtor by the payment of the collateral obligation by the maker. In that case the payment was made years after the maturity of the note, and without the knowledge of the debtor. The decision does not conflict with the well-established rule that the debtor, in the transfer of a third party's note, gives an implied authority to the maker thereof to pay the same at or about the time of its maturity. The defendant has admitted that the notes were paid on account of the debt and with his sanction. He has ratified the payment by the makers, so that the case (*Harper v. Fairly*) in 53 *N. Y.* does not apply (*Huntington v. Ballou*, 2 *Lans.* 120 ; *Commercial Bank of Buffalo v. Warren*, 15 *N. Y.* 577).

III. Payment of the interest which accrued on the notes at their maturity, can not be said to have been made until the interest had been earned. The credit for the interest could not be given by the plaintiff until it was earned, and the defendant must be presumed to have authorized the payment of the interest at the times only when the same had accrued and not before. The payment of the interest will in itself take the case out of the operation of the statute (*Wenman v. The Mohawk Insurance Company*, 13 *Wend.* 267).

IV. A chattel mortgage was assigned by the defendant as collateral security to the two notes of Betts & Gay endorsed by the defendant to the plaintiff's firm. The mortgage could not be enforced until protest of the notes. If the notes had not been paid at their maturity and the plaintiff had foreclosed the mortgage, the payment would have been reckoned from the time of the sale of the chattels, provided the sale had been made by the

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Opinion of the Court, by MONELL, Ch. J.

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plaintiff within a reasonable time after the maturity of the notes (*Porter v. Blood*, 5 *Pick.* 53). It is only on the actual reduction of the pledged or mortgaged property to money that the same is treated as a payment and accounted for as such, and in the meantime the property is held as collateral (*Brown v. Tyler*, 8 *Gray*, 35).

BY THE COURT.—MONELL, Ch. J.—The question in this case is, whether the statute began to run from the time the notes were transferred, or from the time of their payment. The referee has found the later period, regarding the payment of the notes as a payment by the defendant, so as to imply a new promise at that time.

It does not seem to me to be of any importance, so far as it affects the implied new promise, whether the plaintiffs received the notes in or as payment of the antecedent indebtedness, or merely as security for its payment. The transfer of a security by the debtor to be applied upon his debt, would imply a new promise, as well as an actual payment on account. But the implication would arise at the same time; that is, by the act of transfer or payment.

In this case, the last *act* of the defendant was the transfer of the securities, more than six years before suit brought; and the implication which is raised of a new promise is, not by the delivery, but by the subsequent payment of the notes by the makers.

It is not claimed that the defendant directed, or was even privy to the payment. But the payment was by third persons, of their own obligation; the payment of which to the plaintiffs, as the lawful holders, the law required. This, in the view of the referee, was a payment by the defendant.

To make a part payment evidence of a promise to pay the balance, it must occur under such circum



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stances as are consistent with an intent to pay such balance (Miller v. Talcott, 46 Barb. 167). Actual payment by a debtor, or by his authorized agent, is consistent with such an intent. It is such a recognition of the debt as will authorize the assumption of an intention to pay the balance.

But when the payment is not by the debtor, but by a third person, his authority, derived from the debtor, to bind his principal to a new promise by implication from the fact of payment, must distinctly appear, and can not be inferred from the payment alone (Read v. Hurd, 7 Wend. 408).

To make the payment of the notes a payment by the defendant, it must be assumed that the makers were acting under the authority, or by the direction of the defendant. There was no such express authority or direction in this case; and it can be implied only from the obligation of the makers to pay a debt which the defendant had parted with by transfer to the plaintiffs, and which at the time of its payment belonged absolutely to his creditor.

An implication of an authority to the makers of the notes to make the payment on behalf of the defendant, must have arisen, if at all, *at the time of the transfer*.

The transfer might be construed into a direction to the makers to pay the amount to become due upon the notes to the plaintiff. But such direction could not of itself continue until the maturity of the note, so as to make the payment such an act of the defendant as would authorize, *at that time*, a new promise to pay. In Creuse v. Defignoiux (10 Bosw. 122), the court say: "An agent can not bind his principal by an implied promise made within six years, where the authority to make it was more than six years before. The statute would commence running from the time the authority was given, not from the time the agent made the new promise."

In *Pickett v. Leonard* (34 N. Y. 175), the assignee of a debtor under a general assignment for the benefit of the debtor's creditors, made a payment out of the assigned property to the creditor. Within six years thereafter, the debtor was sued for the balance of the debt. It was held that such payment did not take the case out of the statute. By virtue of the assignment the creditor became entitled to receive, and the assignee was bound to pay. But there the obligation ceased. The assignee was not the agent of the assignor for any purpose other than to pay his debts, and could not, either expressly or impliedly, make for him a new promise. Justice HUNT says: "The assignor places his property in the hands of the assignee for the purpose of paying his debts, who, from the proceeds, pays a creditor a part of his debt; and this is interpreted into saying, 'My assignor is willing to pay the residue of your debt, and on his behalf I promise you that he will do so.' The assignor might well answer, 'I have given no such authority and made no such contract.'"

It seems to me the cases are not distinguishable. The transfer of property in trust to pay debts generally, is the same as the transfer to pay a single debt, and the effect of the payment must, therefore, be the same. But no more in the one than in the other, is the person making the payment the agent of the debtor, so that he can bind him by a promise. Nor is the *authority* to make the payment less in one case than in the other.

How, then, can the payment of the note be construed into a promise to pay the remainder of the debt?

In *Read v. Hurd* (*supra*) one Skiff being indebted to Hurd, the maker of a note, made a payment of the amount of his debt to the plaintiff, to be applied upon the note, and it was endorsed thereon. Hurd was not present, nor did he request the payment. It was held

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Opinion of the Court, by MONELL, Ch. J.

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that it was not a payment by the defendant, and that no new promise could be implied from it.

There was some difference in the facts in the case of *Harper v. Fairly* (53 N. Y. 442), which the respondent's counsel claimed distinguished it from the case now before us. In that case the creditor retained the transferred note for a number of years, receiving the interest, but the principal was not paid until several years after the transfer. This fact is alluded to in the opinion more, I think, to give emphasis to the principle decided, than as constituting any essential element in it. The court had charged the jury that the payments made by the maker of the note had the same effect to take the case out of the statute, as if made by the defendant. In holding that to be error, the *character* and not the *time* of payment, was made the essence; and the court say that the reason that it is so is, that a part payment is an acknowledgment by the debtor of his liability for the whole demand. But to bring a case within the reason of the rule, the part payment must have been made by the party to be charged with the effect of it, or an agent authorized thus to charge him. After citing *Pickett v. Leonard* (*supra*) and other cases in support of the rule, the court continues to say, "The payment in the present case was not made by the debtor, nor with his knowledge, *but by one whose obligation had been transferred* several years previously to the creditor as security for the debt." Then alluding to the payment long after the maturity of the note, they proceed, "There could consequently be no implied authority to make the payment *at the time it was made.*" These latter words, as I have already said, emphasize the rule and forcibly illustrate its propriety, but do not confine the principle to a payment made long after the maturity of the transferred security. There can be no difference. It is the payment, and not the time of the payment,

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Opinion of the Court, by MONELL, Ch. J.

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from which the new promise is to be implied. Laches or delay can not change the rule. If the payment is authorized, it must be authorized when it is made, and the time is not essential.

The new promise must recognize and apply to the old debt, and the transaction must be such, that it can be fairly inferred from it that the defendant intended to pay the residue.

In the language of *Harper v. Fairly* (*sup.*) "it is impossible to spell out of the transaction any *new promise of the debtor*, contemporaneous with the part payment, to pay the residue of the debt."

An implied promise, like an express promise, must not only be an admission of the existence of the debt, but also a recognition of a liability to pay it; and no other or greater effect can be given to a part payment, than that from it a new promise containing all the elements above stated may be implied.

There is no doubt that when the defendant transferred the notes to the plaintiff, that act could have been construed into a new promise. It admitted the existence of the debt, and was a recognition of the defendant's liability to pay it. And from that time the statute would have begun to run. And that is so whether the notes were taken in actual part payment, or as *security* for the part payment of the debt (*Turney v. Dodwell*, 24 *Eng. L. & Eq.* 92).

Notes and bills, when received from a creditor upon antecedent indebtedness, are never a payment, unless expressly made so; but the effect upon the statute is the same. Hence in the case just cited, it was held that the word "payment" must be taken in its popular sense, and to exclude the species of payment in question. In this view the court say the acknowledgment of liability as to the remainder of the debt is not altered by the fact of the notes not being paid. That the acknowledgment is from the *delivery* of the notes,

and that such delivery is a sufficient acknowledgment.

Suppose the notes transferred had not been paid, would the plaintiff have conceded that the transfer was not a payment? I think not. Then if the delivery of the notes was, to save the statute, the payment, how can it be claimed that there was another payment at a subsequent day, which would also save the statute?

The effect of the transfer of the notes as raising by implication a new promise, was complete when the transfer was made, and could not be extended to the subsequent act of the makers of the notes, when the defendant was not present, and which act was not with his authority nor by his direction. Hence, the case fails to show a new promise by the defendant at any time after the delivery of the notes, or by any one having authority to make a new promise for him, and, therefore, the statute began to run from such delivery, and not from the time when the notes were actually paid.

For these reasons I think the referee erred in his conclusion of law.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

SEDGWICK, J.—I think the judgment should be reversed. The only fact that supports the judgment as against the statute of limitations is that the makers of the promissory notes given to plaintiff by defendants as security for the defendants' indebtedness, paid the notes within six years. Then to make this evidence of the new promise by the defendant, Judge RAPALLO said, in *Harper v. Fairley* (53 N. Y. 445), "the part payment must have been made by the party to be *charged with the effect of it, or an agent authorized thus to charge him.*" He also said that the reasoning

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Opinion of SEDGWICK, J.

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of the cases determined "that a part payment, whether made before or after the debt is barred by the statute, does not revive the contract, unless made by the debtor himself or by some one having authority to make a new promise on his behalf for the residue." Under this case the dispute is settled, in my mind, by inquiring if the makers of the note were the agents of the defendants, either to make the payment of the notes or to give a promise on behalf of the defendants to pay the remainder of the debt. They were not agents to make the promise, unless their relation to the notes given as security made them agents of the defendants to pay the note. There is no evidence that the makers of the note ever had any dealings or communication with the defendants, except by giving the notes for a valuable consideration in a transaction altogether disconnected with the present case. Then, when they paid, did they act for the defendant in making the payment? Perhaps it is well to say that they were not makers for the accommodation of the defendant, and so that between them the makers were sureties while the defendant was principal. But they were on the notes, which they paid acting on principal obligations of their own, arising not from any authority given or agency made by the defendant, but from their contract with the defendant which the defendant had assigned to the plaintiff. At the time of the payment the defendant could not have forbidden or stayed it, or modified it or given any particular direction to it. Indeed, if we look nicely into the matter, the makers never made any payment, so far as they were concerned, on the original indebtedness. They only paid their own notes, and the money paid was afterwards or contemporaneously applied, by the plaintiff's firm, on the principal indebtedness, by virtue of the arrangement made between the defendant and them, at the time of the transfer of the note by the defendant.

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Dissenting opinion of FREEDMAN, J.

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Nor was this application of the money by defendant's authority given beyond the six years, a payment by defendant of a kind to take the case out of the statute. It could only do so by giving to the transfer, in which alone the defendant took actual part, the effect of a promise to pay the remainder of the debt, in case of payment of the notes. There is no reason, it seems to me, why such a promise is not barred by the statute of limitations, as much as the original assumpsit of the defendant.

I think the judgment should be reversed, with costs to appellant to abide event.

FREEDMAN, J. (dissenting).—The plaintiff sued as the surviving partner of Isaac H. Smith & Son, to recover a balance due on an account for goods sold and delivered to the defendant by the said firm.

The defendant rested his defense on the statute of limitations.

The referee held that the account between the parties was a mutual, open, and running account, and that the last item proved in the account was the receipt by plaintiffs' firm, within six years of the commencement of the action, of the proceeds of certain notes made by third parties and transferred by the defendant, with his endorsement thereon, to said firm, on account of his indebtedness. He accordingly gave judgment for the plaintiff.

The defendant appealed.

The referee clearly erred in treating the account between the parties as a mutual, open, and current account within the meaning of section 95 of the Code.

The provision of the Revised Statutes of 1830 (2 R. S. 296, § 23), was "that in all actions of assumpsit, debt, or account, brought to recover any balance due upon an open, mutual, and current account, the cause

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Dissenting opinion of FREEDMAN, J.

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of action shall be deemed to have accrued from the time of the last item proved in such account."

But section 95 of the Code contains the additional words, "where there have been reciprocal demands between the parties." This means cross-demands, matters of set-off, or a counterclaim; something upon which the other party could sustain an action (*Peck v. the N. Y. and Liverpool U. S. Mail Steamship Co.*, 5 *Bosw.* 226).

The account before the referee, though a long one, consisted of items of charge to the defendant, and nothing but credits for payments made and for empty barrels returned by the defendant. This not being sufficient, plaintiffs' claim was barred by the statute, unless taken out of it in some other way.

It is insisted that this was done by a payment of a portion of plaintiffs' demand within the six years, and that the evidence and the legal effect of the findings of the referee upon this point are sufficient to sustain the judgment upon this theory.

Section 110 of the Code, which requires that an acknowledgment or new promise shall be in writing, did not change the nature or effect of a payment of principal, or interest, or part thereof. On the contrary, it recognized and continued the rule as established by the decisions of the courts. Such rule depends wholly upon the reason of those decisions. The reason of the rule that a part payment made on account of a claim has the effect to take a case out of the operation of the statute of limitations, or rather to enlarge the time during which an action may be brought, is that such payment in part is an acknowledgment by the debtor of his liability for the whole demand. From this acknowledgment a new promise on his part to pay the residue is implied. The undertaking of the debtor, as to the unpaid part of the debt, is thus, by a legal presumption, renewed and made to date from the time of the part payment (*Harper v. Fairley*, 53 *N. Y.* 442).



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The undisputed facts in this case are, and the referee has found :

That on April 10, 1868, the defendant was indebted to plaintiffs' firm in the sum of two thousand five hundred and one dollars and fifty-three cents on a running and open account, and that being thus indebted, the defendant, on April 14, 1868, endorsed and delivered to said firm two notes for five hundred dollars each, made by Betts & Gay, dated April 6, 1868, and payable in two and five months, respectively, with interest from their date. The notes were secured by a chattel mortgage given by the makers thereof to the defendant, who assigned and delivered the same to plaintiffs' firm, together with the notes. Upon the receipt of the notes they were entered in the books of plaintiffs' firm by charging them to bills receivable, and crediting them to defendants' account. The notes were paid to plaintiffs' firm as they matured, and the sums collected for principal thereon were carried to the credit of bills receivable, viz. : five hundred dollars on June 9, 1868, and five hundred dollars on September 17, 1868. The action was commenced June 5, 1874.

Upon this state of facts the first question that presents itself is, whether the part payment is to date from the time of the delivery of the notes to plaintiffs' firm, or from the time of their collection.

As a general rule, if a vendor of goods receive from the purchaser the note of a third person, at the time of the sale (such note not being forged, and there being no fraud or misrepresentation on the part of the purchaser as to the solvency of the maker), it is deemed to have been accepted by the vendor in payment and satisfaction, unless the contrary be expressly proved (*Whitbeck v. Van Ness*, 11 *Johns. R.* 409 ; *Breed v. Cook*, 15 *Johns. R.* 241).

The contrary may be shown by a contract of guaranty (*Monroe v. Hoff*, 5 *Denio*, 380), or a contract of

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endorsement (*Darnall v. Morehouse*, 45 *N. Y.* 64; *Fowler v. Clearwater*, 35 *Barb.* 143).

But when the note or bill of a third person is not taken at the time of the sale, but upon a precedent debt, the presumption is the other way. In such case the presumption is that the note or bill was not taken in payment and satisfaction of the precedent debt, and the onus of establishing that by the agreement of the parties it was so received, is upon the debtor (*Noel v. Murray*, 13 *N. Y.* 167; *Gibson v. Tobey*, 46 *N. Y.* 637).

In the case at bar the notes were given on account of a precedent debt. They were endorsed by the defendant, and, as additional security, a chattel mortgage to secure their payment was also transferred. There is no proof of an agreement, or from which an agreement can be inferred, that they were taken in actual satisfaction of the debt *pro tanto*. Under these circumstances the payment made by the defendant is to date from the time of the maturity of the notes, and not from the time of their delivery to plaintiff's firm. The second note matured September 19, 1868, within six years of the commencement of the action, and as the payment represented by it was not directly appropriated to a specific item in the account between the parties, in which case the statute would have been left to its operation as to the rest of the items, its effect was to save the whole balance of the account. Where the debtor knows that there exists against him a general account of items, and he designedly pays or furnishes something to lessen the demand on such general account without discrimination, and at that time does not deny his liability for the other previous items, the law reaches an implication of his acknowledgment of the whole account (*Peck v. The N. Y. & Liverpool U. S. Mail Steamship Co.*, 5 *Bosw.* 226, 337).

It is claimed, however, by the appellant that before a

part payment can be construed into an acknowledgment by the debtor of his liability for the entire demand, so as to take the case out of the operation of the statute, it must appear that it was made by the debtor himself, or by his authorized agent.

As a general proposition this is true. The courts of this state have refused to follow the rule of decision made at one time in England, and to some extent in this country, under which, by a constructive equity, judicial refinements came near abolishing the statute of limitations altogether, and have reached the conclusion that the said statute is entitled to the same respect as other statutes. The doctrine that the time for bringing the action might be enlarged, or an outlawed demand revived, by a partial payment not made by the immediate debtor but by a joint contractor, an assignee or a trustee, is therefore no longer recognized in our courts (*Roosevelt v. Marks*, 6 *Johns. Ch.* 266, 292; *Picket v. King*, 34 *Barb.* 193; *Bloodgood v. Bruen*, 4 *Seld.* 362; *Shoemaker v. Benedict*, 1 *Kern.* 176, 185; *Winchel v. Hicks*, 18 *N. Y.* 558; *Pickett v. Leonard*, 34 *Id.* 175; *McLaren v. McMartin*, 36 *Id.* 88).

But at the same time the principle has been rigidly maintained, and it is still in force, that a recognition or ratification of the agency of the person making the payment will bind the debtor.

Thus in *Winchel v. Hicks* (18 *N. Y.* 558) it has been held that if a surety request the principal to make a payment of the interest on the obligation, and it is accordingly made and endorsed, the act is to be regarded as the acknowledgment of both parties.

In *Munroe v. Potter* (22 *How.* 49; *S. C.*, 34 *Barb.* 358), *MORGAN, J.*, held that the surety on an overdue note, who, with knowledge of the facts, took money of the principal to the holder of the note, and had it endorsed thereon as so much paid by the principal, was bound by the acknowledgment which the act indicated.

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and which he participated in and approved of at the time it was done.

In *Huntington v. Ballou* (2 *Lans.* 120) the defendant was an accommodation indorser of a note. Some time after the maturity of the note, the maker, without defendant's authority or knowledge, paid to plaintiff the interest due thereon, and took a receipt reciting that the same had been received from and paid by the defendant. The plaintiff showed the receipt to the defendant, and the latter thereupon examined it, and expressed his approval. It was held that by such act the defendant adopted the payment as his own, and became entitled, as between him and the other parties liable on the note, to the benefits secured to him by the receipt; that, as to the plaintiff he assumed the legal liabilities consequent upon such payment to the same extent as if it had been actually made by him; and that for these reasons the payment took the case out of the operation of the statute of limitations as to such defendant.

The case of the First National Bank of Utica v. Ballou (49 *N. Y.* 155), presented substantially the same state of facts as the case last referred to, and the decision was precisely the same. In delivering the unanimous opinion of the court of appeals, RAPALLO, J., says: "Although Shearman (the maker) was liable on the same notes, yet there was nothing in that circumstance to prevent an arrangement between the parties by which he should make this payment for and on behalf of the defendant; and if he did so, it was immaterial whose money he used. If the defendant had made the payment in person, but Shearman had furnished the money, the payment would be none the less effectual as an admission of liability to bind the defendant. And if the defendant requested Shearman to make it in defendant's name, the effect of the payment as a recognition of the defendant's liability, would not be dimin-

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ished by the fact that Shearman used his own money. The subsequent ratification of a payment made in that form is as effectual a recognition of liability as if the payment had been made by previous request.

In the present case the notes were paid by the makers at maturity as contemplated by all the parties, and as the defendant by his contract of endorsement had undertaken to see that they should be paid. By handing them to plaintiff's firm in the manner he did, and failing to make a specific appropriation of them, the defendant, as has already been shown, authorized the said firm to apply the payment, when received, in reduction of his general indebtedness. By this arrangement the defendant secured to himself the benefit of an extension of credit. The mortgage could not be enforced until default in the payment of the notes, and the taking of the notes suspended the right of action of plaintiff's firm against the defendant to the extent of one thousand dollars until the maturity of the notes. No reason exists, therefore, why the defendant should not be held to have given implied authority, if not express, to the makers of the notes to pay the same to plaintiff's firm at maturity.

The case of *Harper v. Fairley* (53 N. Y. 442), is clearly distinguishable. In that case the payment was made without the knowledge of the debtor several years after the collateral obligation had matured. It was for this reason that the court of appeals held that there could be no implied authority to make the payment "*at the time it was made.*" It was conceded, however, that if certain facts sworn to by the plaintiff had been submitted to the jury and found in his favor, the express assent of the defendant to this payment would have been established, and that such assent would have been sufficient. These facts were controverted and were not submitted to the jury; and the instruction of the judge authorized the jury to render

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a verdict for the plaintiff, even though they should disbelieve his evidence in that respect. It was for this reason that the said evidence could not avail the plaintiff on that appeal.

Moreover, the testimony in the case at bar, shows a ratification. Plaintiff's bookkeeper testified that subsequently to the payment of the two notes he had a conversation with the defendant concerning them, and that in such conversation the defendant said that he had paid so much on those notes, that he owed more, and would pay the balance. This testimony remained uncontradicted, and is therefore sufficient within all the authorities. Notwithstanding the statutory requirement that acknowledgments and new promises should be in writing, a part payment may be proved by the oral admission of the party (*First National Bank of Utica v. Ballou*, 49 *N. Y.* 155, 158). So where an act, though unauthorized, is apparently for the benefit of the principal, a very slight matter will serve to make out a ratification, and when it plainly appears that the principal at the time did mean to ratify that which apparently was done for his benefit, the law does not compel the court to deny him the privilege. He must be taken to have considered for himself whether the act done was, on the whole, such as he approves and desires to be bound by (*Commercial Bank of Buffalo v. Warren*, 15 *N. Y.* 577).

The decision of the referee being right and sufficiently supported, notwithstanding the erroneous effect given to the account between the parties, the judgment appealed from should be affirmed, with costs.

SPECIAL TERM, MAY, 1874.

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## ISAAC S. ISAACS v. AUGUSTIN DALY.

## I. LITERARY PROPERTY.

## 1. TITLES TO BOOKS, PLAYS, ENGRAVINGS, &amp;c.

1. *Words* which in their ordinary and universal use *denote the virtues*, such as "Charity," "Faith," *can not ordinarily be appropriated* by any one as a title or designation for a book, play, &c., written, &c., by him, treating or enforcing, symbolizing, &c., a virtue, to the exclusion of any other person who may write, &c., a book, play, &c., treating upon enforcing, symbolizing, &c., the same virtue.

a. *BAD FAITH, &c.*—There may be cases where a title is made use of in bad faith, or to promote some imposition, or to inflict a wrong, when a court of justice should interfere to prevent its use or to compensate a party who has in consequence sustained an injury.

Motion for an injunction.

*Adolf L. Sanger*, for the motion.

*A. Oakley Hall*, opposed.

CURTIS, J. (at special term).—This action is brought to restrain the performance of a play called "Charity;" also for an accounting of profits, and for twenty thousand dollars damages. December 19, 1873, the plaintiff deposited in the copyright office at Washington the title of a play called "Charity," and copyrighted such dramatic composition. In January following, the defendant purchased the exclusive right,

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as he alleges, to possess and use manuscript copies of an entirely different play by William S. Gilbert, Esq., also called "Charity," the latter then being played at The Haymarket, London.

The defendant in February following prepared it for performance, and on the 27th of that month advertised it for a public representation on March 3, the day subsequent to the hearing of this motion for an injunction.

It is objected that the action should have commenced in the federal courts. This court has long exercised a jurisdiction to protect literary property, and the act of congress in 1870, conferring jurisdiction in this class of suits, upon the federal courts, appears to afford an additional remedy, without affecting the pre-existing jurisdiction in respect to the rights the plaintiff has in the play, and which exist at common law, independently of all statutes (*Palmer v. De Witt*, 47 N. Y. 532).

The other question as to whether the defendant should be enjoined from performing the play under the name of "Charity," is not free from difficulty. The affidavits fail to satisfy me that the plaintiff would be injured on the ground claimed by him, that Mr. Gilbert's play has been unfavorably received and criticised, when played. It is not alleged that there has been any bad faith on either side. The complication appears to be purely accidental. Should the dramatic performance be enjoined because the word "Charity" is the title of each? No question exists as to any imitation or similitude in Mr. Gilbert's play.

It is simply to be considered whether the use of the word "Charity" in Mr. Isaac's play for a title, and his copyrighting the play, give him the exclusive use of that word as a title in the public performance of plays. Charity is a virtue that has been symbolized and portrayed in every stage and department of art for all ages.

Would it be just that an engraver who has copy-



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righted a design that he entitles "Charity," should restrain another engraver from vending to the public a different design, which the latter also designates as "Charity," both being works of art symbolizing the same virtue, but differing in plan and execution? If this question is answered in the affirmative, the same principle might be invoked by a publisher, who has copyrighted a sermon called "Charity by ———," to enjoin the sale by another publisher of a sermon utterly different in composition, also called "Charity," written by some other person.

The law favors literature and art, and while it seeks to protect all in the enjoyment of their property and their rights, it does not limit and abridge the field of occupation and enterprise. The use of the word "Charity" as a designation for any work of art or literature can not ordinarily be monopolized by any one person. There may be occasions when a title is made use of in bad faith, or to promote some imposition, or to inflict a wrong, when a court of justice should interfere to prevent its use, or to compensate a party who has in consequence sustained an injury. But the present case does not appear to be one where the court is called upon to interfere for any of these reasons.

Both parties having acted in good faith, it would be inequitable to subject the defendant to loss, who has prepared for representation and advertised Mr. Gilbert's play, under the name of "Charity." Nothing is shown by which it appears that the plaintiff would sustain loss by changing the name of his play, if he desired to do so, and I do not find any case where the court has granted a plaintiff under the circumstances appearing in the papers, the relief he seeks by the present application.

The motion for an injunction must be denied, with costs.

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Statement of the Case.

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SPECIAL TERM, JUNE, 1875.

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WILLIAM J. PEASE v. MAURICE J. WALSH.

I. CONTRACT ILLEGAL.

1. *No right of action can spring out of it*, whether it be prohibited by positive law, or is opposed to public policy, or contrary to good morals.

II. DOCK DEPARTMENT OF THE CITY OF NEW YORK.

1. CONTRACT TO USE INFLUENCE WITH THAT DEPARTMENT, OR ALL OR ANY OF ITS MEMBERS, TO PROCURE A LEASE OF CERTAIN PREMISES IS VOID WITHIN THE ABOVE PRINCIPLE.

a. *Thus* when the complaint averred that the plaintiff was employed by the defendant to use his influence with the department of docks, either with all the commissioners thereof, or some one of them, and in such manner as he might see fit and proper, for the purpose of procuring a lease of certain piers for the term of one year or more, at as low a rent as fifty thousand dollars per annum, for which use of his influence defendant agreed to pay him fifteen thousand dollars if the lease was procured on those terms; that he had used his influence with said commissioners, had had many interviews with some one of them, and had finally succeeded in procuring a lease from the dock department at annual rent of forty-five thousand dollars for one year, with a privilege of a renewal for fifteen years; but did not show the plaintiff's business or profession, or that the services to be rendered by him, were those of a lawyer, broker, agent, or person devoted to any special lawful pursuit, in itself either useful or valuable.

*Held,*

*a demurrer to the complaint to be well taken.*

*Moody P. Smith*, for the plaintiff.

*H. J. Scudder*, for the defendant.

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VAN VORST, J. (at special term).—No right of action can spring out of an illegal contract, nor will the court aid either party to enforce a contract which is prohibited by positive law, or is opposed to public policy, or if it be contrary to good morals.

“Where the consideration is vicious, the contract begets no obligation.”

The plaintiff alleges in this case, that he was employed by the defendant “to use his influence” with the department of docks of the city of New York, either with all or with some one member of the same, and in such manner as he might see fit and proper, for the purpose of procuring for the White Star Line Steamship Company, a lease of piers Nos. 51 and 52 on North River in the city of New York, for the term of one year or more, at as low a rent as fifty thousand dollars per annum, for which use of his influence, the defendant agreed to pay the plaintiff fifteen thousand dollars, if the lease was procured on those terms.

The plaintiff claims to have used his influence with the commissioners of docks, and to have had many interviews *with some one member of the same*, and to have finally succeeded in procuring a lease from the dock department, for the “White Star Line,” at an annual rent of forty-five thousand dollars for one year, with a privilege of a renewal for fifteen years.

The complaint does not show the plaintiff’s business, or profession, nor that the services to be rendered by him were those of a lawyer, broker, agent, or person devoted to any special lawful pursuit, in itself either useful or valuable.

The consideration to support a contract must have some appreciable value, moving to the party obliged.

The cause of action disclosed by the complaint may be regarded either as a sale of the plaintiff’s “influence” in the direction indicated, or as an agreement to exercise it, over all or some one of the members of

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the dock commission, for the sum of fifteen thousand dollars, the payment, however, dependent upon the success of this influence, to secure the lease in question.

Judged by the allegations in the complaint, the influence was successful, for as plaintiff claims it secured a lease for fifteen years instead of one, and at an annual rental five thousand dollars less than the sum the defendant was willing to pay for a lease of the piers in question.

It may be well judged, that the members of the dock commission are not to be moved to the granting of leases of the public docks and piers through the influence of the plaintiff, exercised over one or more of its members.

To yield to such suggestions, and throw a loose rein on such practice, would lead to the sacrifice of public and private interests and morals. How such influence through one, over all the members of the commission, could be exercised in a truly useful manner, is not disclosed, and it is difficult to be conceived.

The dock commissioners are public officers, upon whom rest responsible duties. They have the care and oversight of the docks, wharves, and piers.

The board may appropriate any of such wharves or piers to the sole use of special kinds of commerce, and may in the name and for the benefit of the corporation of the city of New York, lease any or all of such property for a term not exceeding ten years, and contract for renewals of such leases at advanced rates for additional terms of ten years each.

All leases, other than for districts appointed by the board to special commercial interests shall be made at public auction to the highest bidder (*Session Laws of 1871*, ch. 574 ; *Laws of 1870*, ch. 383, § 37). The setting aside of districts for special kinds of commerce is doubtless a great public convenience. The result is to

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Opinion of VAN VORST, J.

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gather, and perhaps limit to some distinct quarter, the separate branches of commerce, of which this city is the center.

Such appropriation and designation would depend upon the good, impartial judgment of the commissioners, so as best to meet the convenience of all concerned, and is not to be controlled or swayed by the influence of a party interested in procuring a lease for a particular steamship line, of a pier, to be devoted to its exclusive use.

Any secret influence of this kind could not be other than pernicious.

With regard to leases to be granted to the highest bidder at public auction, no influence to control, thwart, or defeat such method could be sanctioned.

The tendency of judicial decision is to frown upon all efforts, by the exercise of illegitimate influence, to control the deliberations, judgments and action of public bodies and officers. In *Harris v. Roof's Executors* (10 Barb. 489), it was decided that no action will lie for services as a lobby agent, in attending to a claim against the state before the legislature; agreements in respect to such services, being against public policy and prejudicial to sound legislation. In *Davidson v. Seymour* (1 Bos. 88), the plaintiff was employed by the firm of H. C. Seymour & Co., to procure for the firm, from the directors of a railroad company, a contract for the building of its road, and agreed to pay him for his services should he succeed in obtaining the contract, the sum of ten thousand dollars. The contract was obtained by the plaintiff, through the influence with the directors of third parties employed by him, his own agency being concealed; it was held that the agreement was contrary to morality and public policy. In *Gray v. Hook* (4 Comst. 449), it was held that an agreement to pay a person for his aid and influence in obtaining an office is illegal and void.

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Opinion of VAN VORST, J.

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Sedgwick v. Stanton (14 N. Y. 289) and Burke v. Child, decided in the supreme court of the United States in October term 1874, would seem to establish that claims of the nature of the one disclosed in this action can not be enforced by the courts.

This latter is a highly important case, and whilst it may be said that it announces no new principle, its cogent reasoning applies a law of condemnation to the present and kindred claims.

That any influence was in fact exercised over any member of the dock commission, to secure the lease in question, rests exclusively upon the plaintiff's allegations, made for the purpose of recovering his alleged compensation from the defendant.

The question is now raised upon a demurrer to the plaintiff's complaint.

There should be judgment for the defendant on the demurrer, with liberty to the plaintiff to amend on the usual terms.

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SPECIAL TERM, JUNE, 1875.

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CATHARINE DONOVAN v. THE COMPAGNIE  
GENERALE TRANS-ATLANTIQUE.

I. PLEADING.

1. Where a defendant relies on certain facts which can constitute a defense only as connected with the basis of the cause of action, he must in his answer distinctly aver and show such connection.

1. APPLICATION OF RULE.

Plaintiff brought an action against a common carrier for the non-delivery and loss to her of a *certain case* of merchandise, delivered to it at a certain time. An answer averring that plaintiff did deliver baggage and merchandise at the time, with the intention of being smuggled, and that on her arrival at the port of New York, she did smuggle ashore from the steamer large quantities, which formed part of her baggage, does not comply with above rule. *It is bad, as not distinctly averring* that the specific case for the loss of which the action was brought, and which formed the basis of the cause of action, was shipped with such intention.

II. UNLAWFUL INTENTION.—SMUGGLING.

1. WHEN NOT A DEFENSE TO A CARRIER FOR THE LOSS OF THE GOODS.

- a. *It is not when* the carrier is ignorant of the intent, has done no act to facilitate it, and is implicated therein.

III. COMMON CARRIER.

GOODS SHIPPED WITH INTENT ON THE PART OF THE SHIPPER TO SMUGGLE THEM.

1. Effect of when the carrier is ignorant of the intent, does no act to facilitate it, and is not implicated therein.
  - a. It forms *no defense* to an action by the carrier for the freight.
  - b. It forms *no defense* to an action by the shipper, against the carrier, for the loss of the goods.

*W. H. McDougall*, for plaintiff.

*Walter L. Livingston*, for defendant.

VAN VORST, J. (at special term).—The action is against the defendant as a common carrier, for the non-delivery to the plaintiff, and for the loss to her, of a case of merchandise entrusted to the defendant for carriage.

I do not understand the third defense, and which is claimed by the plaintiff to be irrelevant, to aver distinctly that the "case" in question, contained merchandise shipped by the plaintiff with the intention of being smuggled into the United States in violation of the revenue laws.

The averment that she did deliver baggage and merchandise at the time, for such purpose, does not establish that the property in question was of such character, or shipped for such unlawful purpose.

In order that the defense be pertinent and relevant, if otherwise good, it should have been distinctly alleged that the case of goods for the value of which this action was brought, was itself of such objectionable character.

It by no means follows from the averment, that on her arrival at the port of New York, she did smuggle ashore from the steamer large quantities of merchandise which formed part of the baggage, that this specific "case" of merchandise lost to her, was shipped with the intention to evade the fiscal laws of this country.

Such facts might be some evidence, but not necessarily conclusive, that the goods contained in the missing case, were of that character.

But in pleading, it is not evidence which is to be set forth, but issuable facts.

In pleading defenses of this character, to avoid liability, the defendant should be held to clear and



positive averments, and should leave no room for doubt that he means to charge distinctly, that the specific goods, the value of which is the subject of the action, were shipped with the intention of being smuggled.

But aside from this defect in the statement of the defense, I do not think that the carrier can successfully interpose a defense of the character indicated. It is entirely irrelevant.

He is not, according to his own showing "*particeps criminis*."

When he received the goods, he was entirely ignorant of the plaintiff's design, and never became implicated therein.

In *Holman v. Johnson* (*Cowp.* 34), the plaintiff residing at Dunkirk had sold to the defendant a quantity of tea, which was intended to be smuggled into England. The plaintiff himself had no concern in the smuggling; it was held he might recover.

But where the seller, knowingly, does any act calculated to facilitate the smuggling, such as packing the goods in a particular manner, he is regarded as "*particeps criminis*," and can not recover (*Briggs v. Lawrence*, 3 *Term R.* 454; *Tracy v. Talmage*, 14 *N. Y.* 170). *Cheney v. Duke*, 10 *Gill & Johnson*, 1124, however, decides, that in an action to recover the purchase price for a slave, who the vendor knew was to be removed out of the state, without a bill of sale being taken, as the law of the state required, *knowledge* alone by the vendor of the illegal, or prohibited purpose, on the part of the vendee, unaccompanied by any act in furtherance of its execution, was no bar to a recovery.

There was nothing illegal in the service which the carrier undertook to perform. His business was to carry merchandise, from one port to another, for hire.

The undisclosed purpose or design of the shipper, was no concern of his. It was presumptively good.

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Opinion of VAN VORST, J.

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He was entitled to be paid for the carriage, and if he was ignorant of the shipper's intent to smuggle, his claim for freight money could not be defeated.

The wrong in this case consisted in the plaintiff's wicked intention to evade the fiscal laws. But such intention was not carried out. It never ripened into an actual offense so far as the goods in question were concerned. The plaintiffs might have yet repented. As was said in *Pellecot v. Angell* (2 *Crompt. Mees & Ros.* 312): "The plaintiff sold the goods; the defendant might smuggle them if he liked, or he might change his mind the next day." And in this case, the plaintiff might yet, on the arrival of her goods in New York, had they not been lost to her through the carrier's acts, or negligence, have paid the duty, or delivered them in bond.

Contracts for an illegal purpose, or which are against the policy of the law, can not in general be enforced.

But there was nothing in the defendant's engagement to carry the goods which was illegal.

And it can not be maintained that a contract which is itself free from vice, can be avoided, because it may possibly facilitate an illegal transaction (*De Groot v. Van Duzer*, 17 *Wend.* 170).

The motion to strike out is granted, with costs.

## SPECIAL TERM, FEBRUARY, 1873.

## JOHN O'DONNELL, PLAINTIFF, v. WILLIAM LINDSAY, AND JOHN O'DONNELL, DEFENDANTS.\*

## I. EXECUTION—SALE OF REAL ESTATE UNDER.

## 1. SHERIFF'S DUTY AS TO SELLING IN PARCELS, &amp;c.

1. It is his duty to *learn the situation* of the property before he sells, and to sell in obedience to the direction of § 38, art. 2, title 5, chap. 6, part 3, R. S.

1. *Quasi-judicial*. In some cases the facts will be such that the *exercise* of the sheriff's *discretion* will be judicial in its nature.

a. *Final*.—In such cases an honest exercise of the discretion is as final as the action in like case of any judicial tribunal.

## 2. NON-PERFORMANCE OF THIS DUTY, EFFECT OF.

1. *Void and voidable*. It does not render the action of the sheriff void, but only voidable, at the instance of the aggrieved party.

2. *Purchaser*. If the non-performance had given cause for setting aside the sale, such will be its effect as against a purchaser who had notice of the non-performance, and much more against a purchaser who had requested and led the sheriff to make the sale in the forbidden manner.

## 3. SALE IN ONE PARCEL, EFFECT OF.

1. If the facts were such that the sheriff might have so exercised his discretion as that but a part of the lot would have been sold, and he did not exercise his discretion at all, but relied on the purchaser for information; *semble, the sale should be treated as invalid*.

## 1. WHAT FACTS CALL FOR THE EXERCISE OF DISCRETION.

a. *Semble*. An execution for one hundred and seventy dollars, and a lot thirty-seven by one hundred, would.

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\* The judgment entered in conformity with above opinion was not appealed from. Also see *Bruce v. Kelly* (*ante*, p. 27).

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b. *Query*, whether the sheriff could exercise any discretion if the lot was in the city of New York, and was twenty-five by one hundred.

c. *Query*, when there is erected on one lot in the city of New York, twenty-five by one hundred, two buildings separated by a space of twenty feet, both occupied as tenement houses, each independent of the other, and each having a rental as large as many houses occupying full lots, and the entrance to the rear house being through an alleyway on the side of the lot passing for a part of the way under the beams of the floor of the second story of the front building, and it being the most advantageous mode of selling, so as to make the property produce the most, to sell the houses separately, it is *doubtful whether the statute gives the sheriff power to make a sub-division*.

4. SETTING ASIDE SALE.

1. *Inadequacy of price.*

1. This, of itself, although it is so great as to be at least on the verge of a presumption that there was in the conduct of the sale some undiscovered violation of plaintiff's rights, is not enough.

1. *There must be some other circumstance in addition.*

a. But great inadequacy has *refined the ingenuity* of learned judges, in extracting from the facts sufficient to justify annulling the sale (numerous cases cited).

1. *What circumstances sufficient.*

a. The fact that the attorney for the judgment plaintiff furnished the description by which the property was sold, and *himself became the purchaser, is sufficient.*

2. PURCHASER WHEN TRUSTEE FOR THE OWNER.

1. When the purchaser is the attorney for the execution plaintiff, and he has managed or controlled a part of the preliminaries to the sale,—*e. g.*, furnishing a description of the property by which it was sold,—he will be deemed to hold the property as trustee for the owner.

3. *Defective description.*

When the description bounds the property, with one exception, by lots on a map, not stating where a map was, the excepted boundary being a lot stated to be now or late the property of Van Siller, and gives no alleged quantity of land offered for

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sale, it has not the quality of common certainty for the purposes of the notice of sale required by the statute.

4. *Laches, &c., on the part of the owner does not relieve his trustee from the fulfilment of the trust.*

## II. REMEDY OF OWNER.

He may either

1. Move in the action in which the execution was issued
- or*
2. Bring an original action in equity.

Before SEDGWICK, J. (at special term).

In January, 1870, the defendant O'Donnell obtained in the marine court a judgment against the plaintiff, in the sum of one hundred and sixty-four dollars and forty-four cents. The plaintiff appealed from this judgment, and gave, in order to stay proceedings, the usual undertaking to pay the judgment in case of affirmance, with sureties.

On the appeal there was an affirmance on May 27, 1870, and another judgment was entered against the plaintiff for twelve dollars and ninety-four cents, the costs of the appeal.

In those proceedings Mr. John Lindsay appeared as attorney for the plaintiff there, who is the defendant O'Donnell. Mr. John Lindsay and the defendant Mr. William L., were partners in a law firm. O'Donnell, for whom Mr. John L. appeared, was a client of that firm. After the judgments were had, Mr. William Lindsay received from his client some information that the plaintiff in this action owned a house in Forsyth street, in this city.

The judgments not being paid, the defendant Mr. William Lindsay procured from a deed in the register's office a description, for the purpose of giving to the sheriff the necessary data for an advertisement of a sale under execution of the right, title, and interest of the plaintiff to the premises in controversy. The

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plaintiff held the fee of a house No. 148 Forsyth street, in this city. The property was in size twenty-five feet on the front and rear, and ninety-nine feet eleven and a half inches on each side.

The description furnished by Mr. William L., and which the sheriff used in his notice of sale, is contained in the following, which was the sheriff's notice :

" Sheriff's sale : By virtue of several writs of execution, to me directed and delivered, I will expose for sale at public vendue on 23d day of July, 1870, at the vestibule of the City Hall, New York city, at 12 o'clock, noon, all the right, title, and interest of John O'Donnell, which he had on the 20th day of January, 1870, or at any time afterwards, of, in, and to all that certain lot, piece, or parcel of ground, situate, lying, and being in the tenth ward of the city of New York, the east side of Forsyth (late 2d) street, between Delancey and Rivington streets, and distinguished on a certain map or chart of the estate late of the property of James Delancey, Esq., made by Evert Bancker, by lot No. 617, bounded westerly by Forsyth street, aforesaid, northerly by lot distinguished on said map by number 618, easterly by lot distinguished on said map by number 636, now or formerly belonging to Van Siller, and southerly by lot distinguished on said map by number 616, together with all and singular the appurtenances thereunto belonging, or in any wise appertaining.

" Dated New York, June 4, 1870.

" JAMES O'BRIEN,

Sheriff."

In pursuance of this notice the sale was held at the vestibule of the City Hall on July 23, 1870, at noon. The defendant, Mr. William Lindsay, was the only bidder for the property at the sale. He bought it for two hundred and sixty dollars, and gave the sheriff a check for about one hundred dollars. There had been

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given to the sheriff a receipt for the amount of the execution in advance. The plaintiff in this action did not have actual knowledge that judgment had been rendered in his appeal, or that the sale was to take place. After the sale and before the time to redeem had gone by, Mr. William Lindsay wrote through the post office to the plaintiff that the sale had taken place. These letters did not reach the plaintiff. About March 17, 1872, Mr. William Lindsay went to Brooklyn and saw the plaintiff, and demanded from him possession of the property. He left with him written notice that he demanded such possession.

At the time of the sale the property was worth from twenty-seven thousand five hundred dollars, to thirty thousand five hundred dollars.

The plaintiff was married, and there were mortgages upon the whole of the land for seven thousand six hundred dollars. The plaintiff's interest in it was worth from thirteen thousand dollars to fourteen thousand dollars. The buildings on the lot had a rental of more than three thousand two hundred dollars. The net rental for a year was at least five times as great as the sum paid for the property at sheriff's sale.

On the front of the lot was a four-story building, occupied as a tenement-house. The rental of this was about two thousand four hundred dollars.

On one side of this house was an alley or passageway, three feet wide, which led from the street in front to a yard on the lot. This yard separated the house on the front of the lot from another house of four stories on the rear of the lot. The rear house rented for about nine hundred dollars. The yard was about twenty feet deep across the breadth of the lot.

The sheriff in due time executed and delivered to Mr. William Lindsay a deed of the property. The plaintiff, before this action began, tendered to Mr. Lindsay the amount of his bid and interest, and de-

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manded a conveyance to himself of the premises. This was refused, and the tender was rejected.

The complaint demanded judgment, that the sheriff's sale be adjudged illegal; that the sheriff's deed be declared invalid; that the plaintiff be decreed to be seized and possessed of the estate he had at the time of the sheriff's sale, and that the defendant Lindsay be decreed, upon receiving the amount of his bid, and the proper interest thereon, to reconvey to the plaintiff the property described in the sheriff's deed.

*Bushnell & Albright*, attorneys, and *S. Jones*, of counsel for plaintiff.

*J. F. Harrison*, attorney, and *Theron R. Strong*, of counsel for defendant Lindsay.

SEDGWICK, J. (at special term).—The plaintiff claims that the sale made by the sheriff, was in violation of the thirty-eighth section of 2 R. S. p. 269. That section is—

“When real estate offered for sale by virtue of any execution, shall consist of several known lots, tracts, or parcels, such lots, tracts, or parcels shall be separately exposed for sale, and if any person claiming to be the owner of any portion of such estate, or of such lots, tracts, or parcels, or either of them, or claiming to be entitled by law to redeem any such portion, shall require such portion to be exposed for sale separately, it shall be the duty of the sheriff to expose the same for sale accordingly.”

“No more of any real estate shall be exposed for sale, than shall appear necessary to satisfy the execution.”

This seems (see reviser's notes) to have been meant to be declaratory of the law, as it then stood, except-



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ing that part allowing grantees to require a severance, which was proposed in order to facilitate a redemption by them. Nor, has there been, either before or after the Revised Statutes, any diversity in the cases as to this part of the sheriff's duty under an execution.

There is no doubt that the statute imposes a duty upon the sheriff. It pre-supposes that that officer must learn the situation of property before he sells, and shall sell in obedience to its direction. In some cases the facts will be such, that he is obliged to exercise a discretion which is judicial in its nature, in acting upon one set of circumstances, opposed by another set. Then an honest exercise of that discretion is as final as the action in like case of any judicial tribunal (*Litchfield v. Regular*, 9 *Wall.* 577; *The Secretary v. McGanahan*, *Id.*, 311; *Gaines v. Thompson*, 7 *Id.*, 349).

In any case, the action of the sheriff, no matter how great the irregularity of the sale, is not void (*Cunningham v. Cassidy*, 17 *N. Y.* 276; *Wood v. Monell*, 1 *Johns. Ch.* 503).

It is but voidable on the application of the aggrieved party, who, not having waived his rights, takes, in due time, a proper proceeding for the purpose of setting aside the sale. Such a party has a right to insist that the sheriff should have performed his duty under the statute. If the non-performance of that duty has given cause to set aside the sale, such should be the result against a purchaser at the sale, who had notice of the non-performance of duty, and much more against a purchaser who had requested and led the sheriff to make the sale in the forbidden manner (*May v. May*, 11 *Paige*, 203; *King v. Morris*, 2 *Abb. Pr. R.*, 295; *Requa v. Rea*, 2 *Paige*, 340).

The purchaser in this case, as attorney for the judgment creditor, was the cause of the sheriff's using the description of the property he did use for the sale

and of the sale being made according to that description. If this led to or was a violation of the plaintiff's legal rights, the sale should be set aside against the purchaser here.

The plaintiff maintains that the property should not have been sold in one parcel. If the facts were such, that if the sheriff had not relied upon the purchaser for information, but might have so exercised his discretion, that but a part of the lot would have been set up for sale, then it might be right to consider if the sale should not be treated as invalid to pass the title to the purchaser, on the ground that the plaintiff had a legal right to whatever possible benefit might have followed the sheriff's exercise of discretion (*Russel v. Conn*, 20 *N. Y.* 83; *Lanergan v. People*, 39 *N. Y.* 44).

It would then be necessary further to decide whether in the facts of the case there was anything to call for the judgment of the sheriff, as to whether anything less than the whole lot should be sold. If from the state of the property it would be impossible to subdivide it, then the sheriff could not have used discretion which might have benefited the plaintiff.

The real estate in question did not consist of several known lots in the meaning of the Revised Statutes. It was known as but one lot. There was nothing to indicate that there had been a previous purpose on the part of the owner to present it to others as in fact subdivided. The statute contemplates that there should be some indication of this to constitute what it meant by several known lots. The section implies a contrast between land in fact subdivided and land capable of subdivision. Nor did the plaintiff require that the sheriff should sell less than the whole at one time.

Distinct from this injunction of the Revised Statutes is the further prescribed duty of the sheriff to sell no more than appeared necessary to satisfy the execution. Before the Revised Statutes it was deemed an abuse of

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power for the sheriff to sell more (*Woods v. Monell*, 1 *John. Ch.* 502; *Tiernan v. Wilson*, 6 *Id.* 411). The case last cited, says, "It is not to be disputed that a sheriff ought not to sell at a time more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand, provided the part selected can be conveniently and reasonably detached from the residue of the property, and sold separately." It would be full of risk to say that a sheriff would be justified in selling the whole of one parcel of vacant land in this city, thirty-seven feet by one hundred feet, to satisfy an execution of one hundred and seventy dollars. On the other hand, when custom and use, the best tests, have found that for general purposes the most convenient and valuable size for a city lot is that in this case, viz., twenty-five feet by one hundred feet, I think it would be doubtful if the sheriff is justified in making an experiment as to the effect of a subdivision upon the gross value. That is in the case of a vacant lot.

We have here a peculiar case. Although but one lot, there was upon it two buildings separated by a space of twenty feet; they were occupied as tenement houses, and one was altogether independent of the other in respect of their use. Each had a rental as large as many houses occupying full lots. No doubt each would have brought, on even such a sale as this was, just as much as was paid for the whole, whether there had been given to the rear a right of way through the front part of the lot or not. That is but one element under the statute. The other is that pointed out in *Tiernan v. Wilson*, viz.: What is the effect of selling part upon the value of that left unsold? The preponderance of testimony in this case is that an owner could get the most out of the property, by selling the houses separately. In such case the owner has the power to carve up the estate so as to suit circumstances. The

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sheriff has no such power. He sells things in the state in which he finds them. If he had sold either part separately, the law perhaps might have attached as a consequence, that there should be a right of way through the front lot. That has been held to be the consequence of selling off under an execution part of a debtor's land, which shuts the remainder from a highway. In these cases, the operation of the execution is similar to that of an extent at common law, and where property is appraised and set off to the judgment creditor (*Taylor v. Townsend*, 8 *Mun.* 411; *Parnam v. Wend*, 2 *Mun.* 203; *Allen v. Kincaid*, 2 *Fairfield*, 11 *Maine*, 155). I have doubts that such a rule is applicable to a city of this kind or to our mode of selling under execution. Moreover, in this case the right of way for the back building passes under the beams of the floor of the second story of the front building. I hesitate to decide that in making the subdivision the sheriff would not be making an experiment or speculating upon contingencies, and so use a discretion the statute did not mean to give him. I go to other aspects of the case.

The price given in this case by the purchaser, was very far below the value of the property. The inadequacy was so strong and manifest that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it (*Gwynne v. Heaton*, 1 *Bro.* 8).

There has justly been such sensitiveness on the part of the courts of this state, against invalidating sales for mere inadequacy of price (*Livingston v. Bryne*, 11 *John.* 555; *Tripp v. Cook*, 27 *W.* 143; *Marsh v. Ludlum*, 3 *Sand. Ch.* 55), that I can not rest the case on that alone; although here the inadequacy of price is so great, as to be at least on the verge of a presumption that there was in the conduct of the sale, some undiscovered violation of the plaintiff's rights (*American Ins. Co. v.*

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Oakley, 9 *Paige*, 259, note 4 to § 244, *Story Eq.*), for instance, some keeping away of bidders.

The general rule must be observed, that to set aside a sale, there must in addition to inadequacy of consideration be some other circumstance, *e.g.*, surprise, ignorance, mistake, inadvertence. It will be seen, however, in the cases, that a great inadequacy has refined the ingenuity of the learned judges in extracting from the facts of the cases sufficient to justify annulling the sale (Griffith v. Hawley, 10 *Bosw.* 588; King v. Platt, 37 *N. Y.* 155; Dwight's case, 15 *Abb.* 259; King v. Morris 2 *Id.*; Francis v. Church, *Clarke Ch. R.* 475; Gardner v. Schermerhorn, *Id.* 105; Hoppock v. Conklin, 4 *Sandf. Ch.* 582; May v. May, 11 *Paige*, 203; Brown v. Frost, 10 *Id.* 245; Requa v. Rea, 3 *Id.* 340; Williamson v. Dale, 3 *John. Ch.* 292; Lansing v. McPherson, 3 *Id.* 426; Billington v. Forbes, 10 *Paige*, 487; Mulks v. Allen, 12 *W.* 253; The President, &c., of Ontario Bank v. Lansing, 2 *Id.* 261).

In *Gwynne v. Heaton*, already cited, the chancellor said that inadequacy of price combined with considerations of public policy would set aside a bargain. "The heir of a family dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and, therefore, avoided, but as pernicious in principle, and, therefore, repressed (1 *Bro.* 10).

In *Howell v. Baker* (4 *J. C. R.* 120), Chancellor KENT, was of the opinion, although he did not decide the case on that position, that if an attorney for a judgment creditor had the management of a sale under execution and bought in property at it, he was a trustee for the owner of the property. He cited for this, Lord THURLOW in *Hall v. Hallet*, 1 *Cox*, 134. Chancellor WALWORTH, in *Hawley v. Cramer* (4 *Cow.* 717), said in reference to *Howell v. Baker* that he did not

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agree that an attorney under such circumstances was trustee for the debtor. He said he was a trustee for the creditor, his client, but that he owed no duty to the debtor. *Cramer v. Hawley* did not involve the question whether an attorney controlling a sale owed such a duty to the owner that he could not become a purchaser. So that, as to that general proposition, there seems to be no authority in our courts.

If it were granted that the attorney did owe to the owner a duty, by reason of the former having control of some part of the sale that was likely to affect the price to be given for the property on the sale, there could be no doubt, as I think, that public policy would forbid that his interest as a bidder should be hostile to his duty to manage the sale so that the best sum be procured.

The sheriff having received information as to property that should be sold, is bound to do all those things, as to form and time of notice, and time and place of sale, which the law has prescribed, as calculated to do justice to both sides, in securing the best price on the sale. The sheriff has some discretion as to each of these particulars. For that reason he must be disinterested in the performance of his duty, and can not become a purchaser at his own sale. This is the subject of a statute. Yet such would have been the case without a statute (*Carpenter v. Stilwell*, 11 N. Y. 61). This duty he owes in part, of course, to the owner. Now, if an attorney in the performance of his professional obligation to his client, is allowed by the sheriff to control and manage the sale, and in this way to do those things which have led to the sheriff's being forbidden to become bidder, he stands in the sheriff's shoes, and is subject to the same disabilities. When he buys he may be a trustee for his client at the latter's option. If the law permits him to become a purchaser as against the debtor, he will be led to devise means (at least there

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may be that temptation) to avoid fulfilling this trust to his client.

I think the reasons for an attorney being a trustee for the owner, escaped attention in *Cramer v. Hawley*. "There is no magic in the terms, trust and trustee." "He is a trustee in a technical style who is vested with property in trust for others, but every man has a trust to whom a business is committed by another, or the charge and care of any concern is confided or delegated by commission" (1 *Lead. Cases in Eq.* 209, quoting the language of counsel in *The York Building Company v. Mackenzie*, 8 *Tomlin's Brown P. C.* 42, 64). The principle applies to all persons, judicial or private, ministerial or counseling, who in any respect have a concern in the sale of the property of others (1 *Lead. Cases in Eq.*, 209, *Carpenter v. Danforth*; *Davone v. Fanning*, 2 *J. Ch.* 252; *Michaud v. Girod*, 4 *How. [U. S.]* 554; *Dickenson v. Codwise*, 1 *Sandf. Ch.* 214; *Van Epps v. Van Epps*, 9 *Paige*, 241; *Tomey v. Bank of Orleans*, *Id.* 650; *Dobson v. Racey*, 3 *Sandf. Ch.* 60; *Case v. Carroll*, 35 *N. Y.* 389).

The principle in respect of the attorney purchasing at sales, which is referred to in *Howell v. Baker*, exists in Great Britain, and the case of *Hall v. Hallet* is approved there. In *Atkins v. Delnege* (12 *Jr. Eq.* 1) it is said that no solicitor having the conduct of a sale under a decree can purchase at it (*Harrison v. Guest*, 6 *DeG. Met. & G.* 435; *Price v. Maxon*, cited in the argument of counsel in *Watson v. Beach*, 1 *Ves. Jr.* ). In *Ex parte Hughes* (6 *Ves.* 624), *Hughes*, who was a creditor of a bankrupt, had given advice as to the up-set price at which the bankrupt's property should be set up at the bankruptcy sale. In that case, it was considered that, therefore, he was incapacitated from bidding and purchasing.

If the principle is applicable to this case, it can make no difference that the purchaser had managed or

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controlled but a part of the preliminaries of the sale. If he could become a bidder, there would be the temptation to arrange that part to suit his own interests. Nor do I see that because the creditor himself may become a purchaser that, therefore, his attorney may. The former does not and the latter generally does interfere with and shape the details of the proceeding. But if the creditor in an execution should undertake such a thing himself, I think he would undertake a duty to the debtor, which as a matter of policy, should permit the debtor to consider him a trustee. Justice would of course be done the creditor in the terms of opening the sale.

Therefore I consider that in this case the purchaser holds his title to the property as the trustee of the plaintiff, on the broad principle that has been examined. His client's demand has been satisfied by payment, he having according to the testimony renounced any interest in the purchase. Beyond this, however, this must be taken together with the great inadequacy of price given. The something that the law requires to be combined with the inadequacy, is found in the relation of the purchaser in this action to those circumstances of notice, &c., which it is the theory of the law should lead to the value of the property being obtained at a public auction. The law can not expect that in general a debtor can put his finger on a defect in such proceedings.

The plaintiff's rights do not, however, rest alone on what has been considered. The kind of notice virtually given by the purchaser calls for particular attention. The statute requires that in every such notice the real estate to be sold "shall be described with common certainty, by setting forth the name of the township or tract and the number of the lot, if there be any, and if there be none, by some other appropriate description" (§ 35). This notice is given that the



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public whom the law invites to such auctions, may be able to know where and what, is the property they are about to purchase (*Jackson v. Delancey*, 13 *Johns*. 539), and that all may bid and become purchasers on equal terms (*Mason v. White*, 11 *Barb.* 185). The description of the property in this case, was, we have said, framed by the purchaser and furnished to the sheriff.

If it was defective, he is not a *bona fide* purchaser under § 40. It may be that this notice was not indefinite or uncertain under *Jackson v. Roosevelt* (13 *John.* 98). But no one from the description itself could have found the property. Its bounds with one exception were by lots on a map. It was not stated where that map was. The exception referred to is one lot serving as a boundary, and was said to be now or late of the property of Van Siller. That gave no information. The only ways that the people to whom that notice was addressed could find the property were, first, to find the maps, and then get information on which to go further in the examination, or else to proceed to the block in Forsyth street, and ask perhaps from door to door for facts, from which it might be spelled out where the land was. The description did not have the quality of common certainty for the purposes of that notice. It is easy to give the street number. In this case, not even an alleged quantity of land offered for sale was stated to attract bidders. This serves to partly explain why there was no chance bidder ready to run the chance of paying more than two hundred and sixty dollars for a property, whose net rental was more than thirteen hundred dollars.

The other facts that attended the sale, furnish thought as to other ground for treating the purchaser as a trustee for the plaintiff, but I do not think that the whole facts together would justify my taking that ground.

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There were two sureties on the undertaking on appeal. The property was sold at noonday in the month of July, and although the only bidder was the attorney for the creditor, there was no adjournment. I am so convinced from the testimony of the integrity and honesty of the purchaser, that I do not look to these facts to see if they show that there was a purpose that the property should be sacrificed. I only now detail them to show the adverse circumstances under which a debtor's property may be exposed to sale, in cases where there are no evil intentions. This should lead to a scrupulous observance of whatever is meant to protect his interests. It also gives strength to the argument that on grounds of policy no one that has taken part in conducting the sale should be allowed to purchase at it.

The inadequacy of the price paid, with the fact that the notice was of the kind specified (for which the purchaser was responsible), requires that the defendant, Lindsay, should be deemed to hold the property as if as to him there had been no valid sale. This is, I think, the necessary result apart from any considerations of general policy that have been looked at. He must, therefore, be adjudged to execute and deliver to the plaintiff a conveyance of the property.

Having reached this conclusion, it is hardly necessary to say that any laches, or neglect, or want of vigilance on the part of the plaintiff that may have existed, do not give a reason that the purchaser as his trustee should not fulfill his duty to him.

I have considered the objection taken by the learned counsel for the defendants, that the relief, if any, that the plaintiff was entitled to, should be asked on a motion in the action in which there was judgment and not in an original action (*McCotter v. Jay*, 30 *N. Y.* 80; *Brown v. Frost*, 10 *Paige*, 245; *Nicholl v. Nicholl*, 8 *Id.* 349; *Groff v. Jones*, 6 *W.* 523, and other cases). I

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think the rule applies to those cases where the decree or judgment specifically provides for the sale of the property. Then all proceedings connected with the sale are in the action and to be passed upon in the action and under the common rule as to *res adjudicata*, are deemed final unless appealed from. Most of the cases cited are of sales in foreclosure suits. In *Groff v. Jones*, which related to a sale under execution in a common-law action, Judge SUTHERLAND said it was not necessary to send the parties applying for re-sale to a court of equity. He did not say that it was improper to ask relief there. But in *Lansing v. Quakenbush* (5 *Cow.* 38), the supreme court held that a court of equity was the more proper forum in which to obtain relief from a sale upon execution, at which the moving party was induced to buy by alleged false representation of the debtor. *Tiernan v. Wilson* (6 *John.* 411), was a case of a bill in chancery, asking to set aside a sale made under execution. *Howell v. Baker* (4 *John.* 119), sustained a bill to redeem on the ground that the defendant who was a purchaser at a sale under execution was a trustee for the complainant. I therefore think that the relief sought by this plaintiff is the proper subject of an action.

The conveyance should be adjudged upon terms. In settling the form of the judgment, I would like to hear the parties as to the terms that should be imposed upon the plaintiff.

**Judgment for plaintiff.**

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## MEMORANDUM CASES.

JAMES A. McMICKEN, *et al.*, PLAINTIFFS AND RESPONDENTS, v. CHARLES L. LAWRENCE, DEFENDANT AND APPELLANT.

## APPEAL—PRACTICE ON.

1. An exception to the denial of a motion for a new trial on the minutes *is unavailing* upon an appeal from the judgment (*Gregg v. Howe*, 87 *N. Y. Sup'r. Ct. R.* 420).
2. Where *no motion* is made either for a dismissal of the complaint, or the direction of a verdict, and the case is submitted to the jury under a charge to which no exception is taken, the review on appeal *must be confined* to a consideration of the questions arising on the appellant's exceptions to the admission or the exclusion of evidence.

Before MONELL, Ch. J., and FREEDMAN, J.

*Heard February Term, 1875 ; Decided March 1, 1875.*

*Thomas Bracken*, attorney and of counsel for appellant.

*F. F. Marbury, Jr.*, attorney, and *F. F. Marbury*, of counsel for respondent.

It appearing that although on the trial the defendant made a motion for a new trial and to the denial thereof excepted, but made no motion for a dismissal of the complaint or the direction of a verdict, and allowed the case to be submitted to the jury under a charge to which no exception was taken, *held on appeal from the judgment* that the exceptions taken to

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Statement of the Case.

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the admission and exclusion of evidence being untenable, the judgment should be affirmed.

FREEDMAN, J., wrote for affirmance, laying down the propositions contained in the head-note.

MONELL, Ch. J., concurred.

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DANIEL W. RICHARDS, *et al.*, PLAINTIFFS AND  
RESPONDENTS, v. JOSEPH C. WOODRUFF, *et al.*,  
DEFENDANTS AND APPELLANTS.

AGENCY.—MOTION TO NON-SUIT.

Before MONELL, Ch. J., and FREEDMAN J.

*Heard February, 1875 ; Decided March 1, 1875.*

*Marshall P. Stafford*, attorney and of counsel for appellant.

*Payson Merrill*, attorney and of counsel for respondent.

In this case the only error assigned was the refusal to grant a motion for a non-suit made at the close of the plaintiffs' evidence, on the ground that the person who made the purchase of the goods in question had not been shown to have been the defendants' agent for that purpose.

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Statement of the Case.

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FREEDMAN, J., wrote for affirmance, holding that a *prima facie* case of such agency had been made out.

MONELL, Ch. J., concurred.

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JAMES B. HORNER, *et al.*, PLAINTIFFS AND RESPONDENTS, v. CHARLES B. ABORN, DEFENDANT AND APPELLANT.

CREDIBILITY OF WITNESSES.

Before SEDGWICK and SPEIR, JJ.

*Heard March, 1875 ; Decided May 8, 1875.*

*Patterson & Major*, for appellants.

*G. A. C. Barnett*, for respondents.

This appeal involved nothing but the credibility of plaintiffs' witnesses. Judgment below was for plaintiffs.

SEDGWICK, J., wrote for affirmance.

SPEIR, J., concurred.

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Statement of the Case.

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THE PRESIDENT AND DIRECTORS OF THE INSURANCE COMPANY OF NORTH AMERICA, PLAINTIFF AND APPELLANT, v. MOSES GARDNER, DEFENDANT AND RESPONDENT.

VERDICT, SETTING ASIDE AS AGAINST THE EVIDENCE.

Before MONELL, Ch. J., CURTIS and SPEIR, JJ.

*Heard April, 1875 ; Decided May 3, 1875.*

*Nathaniel A. Prentice*, for appellant.

*R. S. Newcomb*, attorney, and *Albert Cardozo*, of counsel for respondent.

The action was to recover a premium of insurance.

The questions involved at the trial were (1) whether the person who acted on behalf of the defendant was authorized to enter into the contract which he made ; (2) if not, then whether the defendant had ratified his acts.

There was evidence given on behalf of plaintiff and defendant on both of these questions ; and the cause was submitted to the jury, who found for the defendant.

A motion for a new trial on the Judge's minutes, was made and denied, and an order denying the same entered. Judgment was entered on the verdict. Plaintiff appealed from the order and judgment.

The question involved on the appeal was whether the evidence was such as to call for setting aside verdict.

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Statement of the Case.

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HELD, that it was not.

HELD ALSO—(1) It is not proper to interfere with a verdict rendered, unless it would have been proper for the court to have directed a verdict the other way. (2) It is only proper to direct a verdict when there is either no such a conflict in the evidence as requires the jury to determine the dispute, or such a clear preponderance of proof on the one side as would leave a verdict on the other unsupported. (3) In the case at bar there was no such clear preponderance in favor of the plaintiff, but on the contrary such a conflict of evidence as to require the jury to determine the dispute.

MONELL, Ch. J., wrote for affirmance.

CURTIS and SPEIR, JJ., concurred.

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WILLIAM H. PARSONS, *et als.*, PLAINTIFFS AND RESPONDENTS, *v.* JAMES SUTTON, *et al.*, DEFENDANTS AND APPELLANTS.

I. PROOF BY PLAINTIFF—WHAT HE MAY RELY ON.

1. On the *acts and conduct of the defendant* before the trial and at the trial, *down to the time of the case going to the jury.*
  - a. Thus where the issue is whether articles delivered were of sufficient weight, and the defendants proved that they weighed the articles, *but failed to give any proof of a legal kind that they were less in weight than as charged for, such failure leads to the affirmation and not doubtful conclusion that the bill charged for the right weight.*

II. REJECTION OF EVIDENCE.

1. *Of evidence offered to disprove a fact sought to be proved by plaintiff to maintain his case, when not cause for reversal.*



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Statement of the Case.

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- a. When the *fact itself is unimportant* by reason of the plaintiff's case being otherwise sufficiently maintained upon the undisputed evidence.
2. *Of evidence offered to prove damages—when not cause for reversal.*
  - a. When it appears that *no right to damages exists*.

Before MONELL, Ch. J., and SEDGWICK, J.

*Heard March, 1875 ; Decided May 3, 1875.*

*Thomas Darlington*, for the appellant.

*John E. Parsons*, for the respondent.

The action was brought to recover for goods sold and delivered, to wit, divers lots of paper.

The answer among other things set up as a counter-claim, that plaintiffs and defendants entered into an agreement, whereby plaintiffs agreed to make and furnish to defendants by a certain time a certain quantity of paper, for which defendants agreed to pay a reasonable or the market price thereof ; that plaintiffs had failed to perform the agreement, and that defendants had sustained damage to the amount of three thousand dollars ; but the answer did not aver any demand for performance made by defendants, or any performance, or any offer or readiness to perform on the part of the defendant.

On the trial the complaint was sustained by proof of the deliveries of paper generally, of the sending to defendants of a bill of goods, with the charges and prices particularly stated, and of a promise by defendant to pay.

The defendant's testimony denied that they had made any promise to pay the bill as rendered, but in the course of their testimony it was shown that the bill had been received by them, and that with the exception of an item of paper alleged to have been delivered in

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October, there was no denial that the lots of paper as specified in the bill had been delivered ; the only complaint was that the various lots did not contain the number of pounds stated in the bill.

Although the defendants proved that they had weighed the different lots, yet they gave no proof as to the extent of the deficiency. The proof as to this was not definite enough to allow the defendants to ask a reduction of any specific amount. Indeed they made no such claim before the jury. None of the lots of goods were returned or attempted to be returned.

After one of defendants had on his direct examination given evidence as to the alleged promise to pay, he was cross-examined on that subject and the cross-examination was of such a character as justified on the re-direct an inquiry as to all that the witness remembered on that subject, yet such inquiry on the re-direct was under plaintiff's objection excluded, and defendants excepted.

HELD, under the first proposition, and the first subdivision of the second proposition of the head-notes, that the error in this ruling did not call for a reversal.

On the trial defendant put numerous questions with a view of proving the damages alleged in the counter-action, all of which were objected to, and the objections sustained, to which defendants excepted.

There was no proof that defendants ever demanded the paper referred to in the counter-claim or that they ever offered to pay cash therefor, or that they were ever ready or able to pay therefor.

HELD, that the defendants had not shown sufficient performance, or tender of performance on his part to entitle him to damages ; and, therefore,

HELD, that under the second subdivision of the

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second proposition of the head-notes, the exclusion of the evidence constituted real cause for reversal.

SEDGWICK, J., wrote for affirmance of the judgment which had been rendered for plaintiffs.

MONELL, Ch. J., concurred.

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WILLIAM JOHNSON, PLAINTIFF AND APPELLANT,  
v. ROBERT A. WILLIAMS, EXECUTOR, DEFENDANT AND RESPONDENT.

TESTIMONY UNDISPUTED.

1. WHEN NOT TO BE REGARDED AS UNDISPUTED ALTHOUGH NOT SPECIFICALLY CONTROVERTED.

1. When there is enough in the case to *allow of its construction in connection* with the other facts, and to justify the result that although the witness was in general credible yet was incorrect as to the particular testimony in question.

E.G. Where a witness swears that the work set forth in a certain bill was extra, *when it is quite plain from the face of the list* that it contains many items which could not have been extra work.

Before SEDGWICK and SPEIR, JJ.

*Heard March, 1875 ; Decided May 3, 1875.*

Appeal from judgment for plaintiff on report of referee.

A. S. Diossy, attorney, and M. Hand, of counsel for appellant.

S. G. Courtney, attorney and of counsel for respondent.

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Opinion of the Court, by SEDGWICK, J.

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BY THE COURT.—SEDGWICK, J.—On the argument but one reason was stated, why there should be a reversal. It was said that the plaintiff testified that he did certain pieces of work beyond the original contract, at request of the defendant's testatrix, and which the plaintiff swore were correctly stated as to the kind and value in a list put in evidence and that appears in the record here; that there was no evidence that this testimony of plaintiff was incorrect, and, therefore, the referee should have acted upon it as undisputed evidence. The answer is two-fold. *First.* There was enough in the case to allow and perhaps call upon the referee not to take the words of the witness, but to construe his testimony in connection with the other facts, and to justify the result that although in general the plaintiff was a credible witness, still the so-called extra work had been within the verbal original contract. *Second.* The learned counsel is mistaken in thinking that this evidence was not contradicted. The defendant gave evidence which, if believed, called upon the referee to disregard the contents of the list, except in certain respects. Moreover it is quite plain from the face of the list, that it contains many items which could not have been extra work.

Judgment should be affirmed, with costs.

SPEIR, J., concurred.

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Statement of the Case.

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CHARLES OAKLEY, PLAINTIFF AND APPELLANT,  
v. THE MAYOR, ALDERMEN AND COM-  
MONALTY OF NEW YORK, DEFENDANT AND  
RESPONDENT.

I. DUTY, WHEN NOT IMPLIED.

1. NOT FROM A MERE POWER TO DO A THING.

1. *Exercise of power.* That it has been exercised *can not be inferred or implied* from the fact that a power, not coupled with a duty, has been conferred.

II. BOARD OF SUPERVISORS OF NEW YORK.

1. "Resolved that all losses which may be sustained by the default of any of the collectors of the several wards of the city be charged to the said wards, respectively, and added to the taxes of said ward this year."

1. AUTHORITY FOR THE REDUCTION.

Act of 1837, chap. 80, pp. 59, 60.

- a. *Effect of the act.* If merely *confers a power* to retax for losses not coupled with a duty.

1. *No implication can therefore arise* from the passage of the resolution that any particular defalcation has been charged against or included in the tax levy of any particular ward.

b. *Application of the act.*

1. It applies *only* to cases where the collector and *his sureties* are insolvent.

2. LEVYING AND COLLECTING TAXES UNDER SUCH RESOLUTION—  
EFFECT OF ON SURETIES OF A COLLECTOR.

1. *It does not release or discharge them.*

*Seemle*, if the *tax payers* are made the ultimate losers, they might *insist on being reimbursed by any securities* held by the corporation, and such securities might be valid in their hands, and would be valid if they could become the transferees thereof.

Before MONELL, Ch. J., CURTIS and SPEIR, JJ.

*Heard April, 1875; Decided May 8, 1875.*

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*O. P. Buel*, attorney and of counsel for appellant.

*E. Delafield Smith*, counsel to the corporation, and  
*A. J. Vanderpoel*, of counsel for respondent.

The complaint, among other things, averred that plaintiff was one of the sureties on the bond of one Montgomery, a collector of taxes for the year 1836 in the 8th ward; that the collector defaulted in a considerable amount; that the plaintiff's liability for such defalcation was arranged by his giving his promissory notes for one-half the defalcation then discovered, and his bond and mortgage for the further sum of five thousand dollars, as collateral to any further defalcation that might be discovered; that the Board of Supervisors on October 3, 1837, passed the resolution set forth in the head-notes, and that he was ignorant of such resolution at the time he entered into such agreement as aforesaid, and prayed that an account "may be taken of the amount which has been paid to said defendant by said plaintiff from time to time by reason of his alleged liability on said bond, as well as of the rents received by or chargeable to them on said mortgaged premises, as well as of the money received by them from the sale or assignment thereof, and that he have judgment against them for the amount thereof when it shall be ascertained, and for interest on paid sums of money from the times when they shall appear to have been respectively received by said defendants, or when they became chargeable therewith, and for costs."

The plaintiff relied wholly on the said resolution and the effect thereof; introducing no evidence as to the amount of Montgomery's defalcation having been added to the taxes of his ward, or having been collected or paid over to the defendant. There was no evidence that the plaintiff and his co-surety, or either of them, were insolvent in the years 1837 and 1838.

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The cause was tried at special term, before a single judge, when judgment was rendered for the defendant on the merits, with costs.

MONELL, Ch. J., wrote for affirmance upon the propositions stated in the head-note.

CURTIS and SPEIR, JJ., concurred.

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JOHN HOGAN, PLAINTIFF AND APPELLANT, v. WILLIAM E. LAIMBEER, DEFENDANT AND RESPONDENT.

Before MONELL, Ch. J., CURTIS and SPEIR, JJ.

The only point involved in the appeal was whether the verdict was correct on the evidence.

The court held it was, and affirmed the judgment.

*Heard April, 1875; Decided May 3, 1875.*

SPEIR, J., wrote for affirmance.

MONELL, Ch. J., and CURTIS, J., concurred.

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GEORGE W. WESTON, *et al.*, v. FREDERICK  
O. KETCHUM, *et al.* \*

MOTION FOR RE-ARGUMENT OF APPEAL ON GROUND  
THAT THE COURT OVERLOOKED IMPORTANT TESTI-  
MONY.

1. NECESSARY TO SHOW WHAT.

1. The moving party must show that the court had *not in fact considered all* the evidence.

2. WHAT DOES NOT SHOW THIS.

1. It does not *follow*, from the court's *referring* in the opinion *to parts of the testimony only*, that it did not consider the whole.

- a. *This although* it speaks of the evidence thus referred to as being *undisputed*, and disposes of the case upon such view of the testimony.

3. In the case at bar, however, the *evidence referred to* as having been overlooked *does not disturb the harmony* of the evidence upon which the former general term proceeded in its decision.

Before MONELL, Ch. J., CURTIS and SPEIR, JJ.

*Heard April, 1875; Decided May 3, 1875.*

A. J. Perry, for the plaintiff.

F. W. Angel, for the defendant.

The testimony which it was claimed that the court overlooked was that of Mrs. Perry. The present general term were of opinion that her agreement with Weston had respect to the secret of compounding the oil,

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\* For the decision on the appeal from the judgment, see *ante*, p. 54.



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and to its manufacture, rather than to the use merely of the trade-mark ; and that the fact that she made it with Weston, and in the presence of Ketchum, and apparently with his assent, did not destroy, but rather strengthened the equity upon which the previous general term placed its opinion.

MONELL, Ch. J., wrote for denying the motion, with costs, for the reasons above stated.

CURTIS and SPEIR, JJ., concurred.

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WILLIAM H. KNOEPFEL, PLAINTIFF AND RESPONDENT, v. THE KINGS COUNTY FIRE INSURANCE COMPANY, IMPEADED WITH ALANSON TRASK, DEFENDANT AND APPELLANT.

LANDLORD AND TENANT.

1. SIGNS, AGREEMENT AS TO—CONSTRUCTION OF.

M., by his agent J., leased certain premises to an Insurance Company. The lease contained the following clause :

“The one-third, at least, of the front water-table . . . is reserved for signs for the tenants of the rear offices, and such amicable arrangement for signs on the side entrance as may be agreed for.”

M., by the same agent, afterwards leased the offices in the rear to K., and at the time of delivery to K. of his lease, also handed him a slip of paper on which was printed the above clause in the lease to the Insurance Company, so that K. might understand what rights he had, and what the conditions of the lease to the Insurance Company were.

On both leases was endorsed the following rule : “No sign, advertisement, or notice shall be inscribed, painted, or affixed

## Statement of the Case.

on any part of said outside or inside of said building, except of such color and size in such places upon or in said building as shall be first designated by said lessor and endorsed hereon."

*Held,*

That K. took subject to the above clause in the lease to the Insurance Company; and as to *signs on the side entrance* was bound to endeavor to effect an amicable arrangement with the Insurance Company.

**2. ACTION IN EQUITY BY K. RESPECTING SIGNS.**

**1. *As to signs on side entrance.***

1. *Not maintainable, unless* K. has used all reasonable endeavors and exhausted all the means in his power to bring about an amicable arrangement with the Insurance Company.

*a. What relieves him not from this duty.*

He having been insulted by one of the officers of the company about a month before he attempted to put up his signs (even if such were the fact), will not.

**2. *As to signs on water-table.***

1. *Not maintainable when* the Insurance Company at all times conceded to the plaintiff in respect thereof all that the court finds him entitled to.

**Before MONELL, Ch. J., FREEDMAN and SEDGWICK, JJ.**

*Heard May, 1875; Decided June 7, 1875.*

J., the agent of M., who was the owner of certain premises consisting among other apartments of a basement, leased to the defendant, The Kings County Fire Insurance Company, the front part of the basement to be separated from the rear part by a partition running across the basement, mid-way between the third and fourth windows in Liberty place, with a door about mid-way of said partition, to be used by the tenants who might occupy the rear part of the basement, and who were to have the free use of the passage to and from their offices to Liberty street in the front.

The lease contained this clause: "The one-third at least of the front water-table on Liberty street is re-

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Statement of the Case.

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served for signs for the tenants of the rear offices, and such *amicable arrangement* for signs on the side entrance as may be agreed on."

This lease was dated February 10, 1874, and the demised term commenced April 1, 1874.

On February 12, 1874, the owner, through J., his agent, executed a lease to plaintiff for a term to commence May 1, 1874, of the rear half of said basement.

There was printed on the back of each lease the rule which is set forth in the head-notes.

Plaintiff claiming to be entitled to take the third of the water-table reserved for the tenants in the rear out of the middle thereof, and also to have an absolute right to place a sign on the east side of the entrance-door on Liberty street ; and claiming that the defendants had interfered, and threatened further to interfere with him in the exercise of his rights, commenced an action against them to obtain a perpetual injunction against them, restraining them from such interference. In his complaint he alleged that the sign which he intended to place on the door-frame and water-table had been approved of by J., who designated a place on the eastern side of the front door where he should affix the sign, in which place he was about to affix said sign, when interfered with as above stated.

The court below found that the plaintiff was entitled, as a matter of right, to the one-third of the water-table, opposite the interior entrance-door, and to a sign on the eastern side of the said door-way, of the superficial dimensions of the sign exhibited by plaintiff at the trial, but so affixed and attached as not to interfere with, or to obstruct the use and occupancy of such entrance, for purposes of ingress or egress ; and was entitled to a perpetual injunction, restraining the defendants from interfering with, or molesting, or hindering plaintiff's signs, or his rights in such signs, as he afore-

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Affirming opinion of FREEDMAN, J.

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said is entitled to, besides his costs, disbursements, and allowances.

From the judgment entered in conformity with this decision, the Insurance Company appealed.

*Sullivan, Kobbie & Fowler*, for the appellant.

*Davis & Lyon*, for the respondent.

FREEDMAN, J., wrote for affirmance, holding that the clear weight of the whole evidence at the trial was, that whatever rights plaintiff acquired with respect to signs, he derived from a memorandum contained on a slip of paper handed to him by J., at the time of the delivery of the lease to the plaintiff, which memorandum consisted of that clause in the lease to the Insurance Company which is set forth in the head-note; and in reference to which J., in a deposition taken before trial, which was read by the consent of both parties, testified that he handed it to the plaintiff so that he might understand what rights he had, and what the conditions of the lease to the Insurance Company; that as to the signs on the water-table, it appeared that the Insurance Company had at all times conceded to the plaintiff all that the court below had found him entitled to; that as to the signs on the side entrance, it also appeared that plaintiff would not make, and never made, the slightest attempt at a negotiation with the Insurance Company in respect thereto, because, as he said, he had been insulted by one of the officers of the company as far back as March, 1875; that, therefore, under the propositions stated in the head notes, the complant should have been dismissed by the court below; and that consequently the judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

MONELL, Ch. J., and SEDGWICK, J., concurred.

# INDEX.

## ACCEPTANCE.

See **BILLS OF EXCHANGE**, 1; **CONTRACTS** 13, 14; **SALES**.

## ACKNOWLEDGMENT.

See **ASSIGNMENT**, 7.

## ACTION.

There are intrinsic differences between special actions on the case, and trespass or trover, which are not abolished by the code. *Hale v. Omaha National Bank*, 207.

See **ASSESSMENTS**, 7, 8, 10; **CONTRACTS**, 22, 23; **CORPORATIONS**; **EQUITY**; **EXECUTION**; **FRAUD**, 2, 3; **LIMITATIONS**; **SHERIFFS**; **TRADEMARKS**.

## ADULTERY.

See **DOWER**.

## AGENCY.

See **PRINCIPAL AND AGENT**.

## AGREEMENTS.

See **CONTRACTS**.

## AMENDMENT.

1. The code, by its provisions in regard to amendments, protects parties when errors occur and mistakes are made and when a case comes within the scope of its provisions, and there is no bad faith nor wanton delay imputed to the party applicant, and the defense proposed is not an unconscionable one, the court should always permit the amendment. *Schreyer v. Mayor, &c. of New York*, 277.

2. The court has the power to allow any allegation material to the case to be inserted in the answer, although the effect may be to change the defense; and when a new trial has been ordered the court has the same power to allow the parties to amend their pleadings as before the trial. *Id.*

See **TRIAL**, 8.

## ANCIENT LIGHTS.

The English doctrine of ancient lights does not obtain in the state of New York. *Doyle v. Lord*, 421.

## ANSWER.

See **AMENDMENT**; **APPEAL**, 7, 10; **CARRIERS**, 3; **EXECUTION**, 2; **JUDGMENT**, 6, 7; **PLEADING**; **PLEDGE**, 2, 3; **PROMISSORY NOTES**, 5; **REFERENCE**, 3-6.

## APPEAL.

1. An objection that plaintiff's remedy was at law and not in equity, if not taken below, can not be raised on appeal. *Bruce v. Kelly*, 27.

2. A decision upon trial by the court can be reviewed only by appeal from the judgment entered on such decision, or under § 268 by motion at general term for a new trial. Therefore a motion on a case or exceptions, for a new trial, will not be entertained at special term. *Weston v. Ketchum*, 54.

3. When the judge at the trial lays down a proposition of law,

- the converse of which, if charged, would not have called for or justified any different determination of the case than that arrived at, and ought not in law to any way affect the determination, it is unnecessary, on appeal, to consider whether the proposition is correct or not. The proposition being immaterial, its error (if it be erroneous) presents no cause for reversal. *Whitney v. Mayor, &c. of New York*, 106.
4. In the construction of instructions to the jury, the whole charge must be considered and applied to the facts of the case. *Muher v. Central Park, North & East River R. R. Co.*, 155.
  5. The findings of a referee upon conflicting evidence should not be disturbed, and especially so, when the contradictions are irreconcilable, and one side or the other must be disregarded. *American Corrugated Iron Co. v. Eisner*, 200.
  6. His findings of fact, like the verdict of a jury, will not be disturbed by an appellate court, unless unsupported by, or very clearly against, the weight of evidence. *Ib.*
  7. An order allowing a material allegation to be inserted in the answer is not appealable. [Per MONELL, Ch. J.] *Schreyer v. Mayor, &c. of New York*, 277.
  8. The general term on appeal should have all the papers upon which the order appealed from was based, placed before it. *Eldridge v. Strenz*, 295.
  9. In this case the remittitur from the Court of Appeals to this court, which was before the special term, does not appear among the papers. *Ib.*
  10. The plaintiff's right to an order that the defendant pay to him an amount admitted to be due by the answer is a substantial right when the answer "admits part of the plaintiff's claim to be just," being in the nature of a right to a judgment; and, therefore, no question arises as to whether a party can appeal from an order affecting it. *Wireman v. Remington Sewing Machine Co.* 314.
  11. Where the rules and principles of law involved are important, and affect large and varied public interests; and where, in the opinion of the court, the rules and principles of law that should control, have not been fully settled by the court of last resort in this state, leave to appeal to the court of appeals should be granted, on proper conditions. *Atlantic & Pacific Telegraph Co. v. Barnes*, 357.
  12. For the purposes of an appeal, in a case tried before a referee, a party who deems certain facts as mentioned in his case, must procure the referee to either find or refuse to find them. *Kemple v. Darrow*, 447.
  13. If the facts as claimed to exist are not found, the general term can not assume them to exist; and if there is no refusal to find them, the court can not look into the testimony to see whether there is any evidence to support them, or whether the referee ought to have found them. *Ib.*
  14. A general finding can not be affected by any evidence of a particular fact, which the referee has neither found nor refused to find. *Ib.*
  15. A defendant agreed to furnish a plaintiff with certain materials, in such numbers and amounts as might be required. The referee found generally that defendant had failed to perform. *Held*, that whatever evidence there was which it was claimed established that, by the agreement between the parties, the material was all to be delivered within a certain time, and that plaintiff would not permit a delivery within that time, but had improperly delayed

- and obstructed defendant, so that he could not make delivery within the time, and had refused to allow delivery to be made when he was ready to do so, neither the claimed fact that the time of performance was limited by the contract, nor the evidence which it was claimed supported it, could be considered, the referee having neither found nor refused to find specifically on such claimed particular fact. *Ib.*
16. Costs of appeal will not be allowed to either party, when the judgment below was for too much, and plaintiff on discovering the error offered soon after the appeal to make the proper reduction. *Ib.*
17. The grounds upon which a motion for a new trial, made on the judge's minutes, is based, must appear in the record on appeal from an order denying the motion. *Alfaro v. Davidson*, 468.
18. When there is an appeal from the judgment as well as from the order denying a motion for a new trial, and both appeals are brought on for argument at the same time, this rule is relaxed; because the court is in a position to do full and complete justice between the parties, according to the exigencies of the case, and without regard to mere matters of form. *Ib.*
19. When, however, the appeal from the order denying the motion for a new trial is brought on for argument while the appellant is keeping himself in such position, so that in case of non-success he may prosecute a further appeal from a judgment already entered, or to be entered, the rule will be strictly enforced, and the order below affirmed for the reason that the grounds on which the motion was based do not appear on the record. *Ib.*
20. Where a witness gives to a question, the allowance of which is not error, an answer which is responsive, but merely states his opinion on the subject-matter inquired of, and no objection is taken to his answer, there is no error calling for a reversal. *Pollock v. Brennan*, 477.
21. Sustaining an objection urged in the middle of a question, is not error where the reason for the exclusion does not appear, and the counsel does not claim the right to complete. A substantial reason, growing out of the usual incidents of a trial, must be presumed to exist. *Ib.*
22. Error can not be assigned under a general objection to the reception of evidence as too remote, the subject-matter of which is pertinent to the inquiry. A special objection must be made, based on the ground of remoteness. *Ib.*
23. Exclusion of unimportant testimony is not cause for reversal, although the inquiry is pertinent. *Ib.*
24. An exception to the denial of a motion for a new trial on the minutes is unavailing upon an appeal from the judgment. *McMicken v. Lawrence*, 540.
25. Where no motion is made either for a dismissal of the complaint, or the direction of a verdict, and the case is submitted to the jury under a charge to which no exception is taken, the review on appeal must be confined to a consideration of the questions arising on the appellant's exceptions to the admission or the exclusion of the evidence. *Ib.*
26. The rejection of evidence offered to disprove a fact sought to be proved by plaintiff to maintain his case, is not cause for reversal, when the fact itself is unimportant by reason of the plaintiff's case being otherwise sufficiently maintained upon the undisputed evidence. *Parsons v. Sutton*, 544.

27. The rejection of evidence offered to prove damages is not cause for reversal, when it appears that no right to damages exists. *Ib.*
28. Upon a motion for re-argument of an appeal on the ground that the court overlooked important testimony, the moving party must show that the court had not in fact considered all the evidence. *Weston v. Ketchum*, 552.
29. It does not follow, from the court's referring in the opinion to parts of the testimony only, that it did not consider the whole. This although it speaks of the evidence thus referred to as being undisputed, and disposes of the case upon such view of the testimony. *Ib.*
30. In the case at bar, however, the evidence referred to as having been overlooked does not disturb the harmony of the evidence upon which the former general term proceeded in its decision. *Ib.*

See CONTRACTS, 13; COSTS, 3.

#### ARREST.

1. An application for exoneration of bail is too late when made after the bail have become charged. *Hissong v. Hart*, 411.
2. The return of the sheriff can not be questioned in an action against bail, and therefore can not be questioned on a motion to discharge the bail. *Ib.*

See MALICIOUS PROSECUTION.

#### ASSESSMENTS.

1. Even though an assessment for local improvements in the city of New York was originally invalid and void, and the act of 1872 (*Laws of 1872*, ch. 580, p. 1412), does not operate to validate it, yet by force of that act as expounded by *Lennon v. Mayor of N. Y.* (55 N. Y. 361), courts of equity are deprived of

the power, in suits commenced after the passage of the act, to declare such assessments void, and cancel them of record, and enjoin their collection until the assessment is sought to be enforced by the taking of the assessed property. *Astor v. Mayor, &c., of New York*, 120.

2. The entry of the assessment in the office of the comptroller of the city, among the entries of assessments confirmed, is not a seeking so to enforce the assessment. This is not a proceeding for its collection. *Ib.*
3. Neither is an admission that "proceedings have been taken towards its collection" sufficient evidence that proceedings have been taken for collection. There can be no inference from this, either that the land has been advertised for sale, or that it has been sold, or that a lease is about to issue under *Laws of 1871*, ch. 381, especially where the three years which must elapse before advertising for sale have not expired. *Ib.*
4. The act of 1872, above referred to has not been repealed; its provisions have been extended by act of May 2, 1874, ch. 313, p. 366. *Ib.*
5. *Semble*, the liability of parties assessed can not be affected by nice jurisdictional questions arising out of proceedings to impose the assessment. *Ib.*
6. The act of 1858 (*Session Laws*, 1858, ch. 338) authorized a judge of the supreme court, at special term, to vacate assessments upon the allegation and proof of "any fraud or legal irregularity" therein. An amendment to this act, by the act of 1874, struck out the words, "or legal irregularity," and substituted the words, "or substantial error," and a further amendment provided that "hereafter no suit or action in the nature of a bill in equity, or



- otherwise, shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but the owners of property shall hereafter be confined to their remedies in such cases to the proceedings under the act hereby amended." In the case at bar the plaintiff seeks to restrain, by injunction, the sale of his property by the corporation, and the collection of the assessment by any other mode or process, thus invoking the equity jurisdiction of the court, for relief, instead of the remedies provided in the act. *Held*, that such an action can not be maintained. The remedies under the act are adequate to the relief of the plaintiff, and should be pursued by him. *Rue v. Mayor, &c. of New York*, 192.
7. The act of 1874, is not in conflict with the provision of the constitution (art. 6, § 12) which continued the Superior Court with the powers and jurisdiction that it held and possessed at the time of the adoption of the constitution. That act merely affects the remedy to be pursued by the person injured. *Ib.*
  8. The legislature has always, and rightfully, assumed the power to change the forms of proceedings and remedies, and to limit them to certain tribunals, and any general law affecting the mode of obtaining a remedy, can not be construed into an infringement of constitutional jurisdiction or power. *Ib.*
  9. The amendment of 1874, is a valid and constitutional law. *Ib.*
  10. A city assessment for street improvements is not deemed to be fully confirmed, so as to be due, and be a lien upon the property included in it, until the title thereof, with the date of confirmation, shall have been entered, with the date of such entry, in a record of the titles of assessments, kept in the office of the street commissioner, and also until the title of said assessment shall have been entered with the date of confirmation, and of said entry, in a record of the titles of assessments confirmed, kept in the office of the clerk of arrears (*Laws of 1853, 1065, § 6; Laws of 1871, 741, § 1*). *De Peyster v. Murphy*, 255.
  11. Assessments for street improvements in the city of New York, are not only a personal liability against the owner of the lands included therein, but are also a lien, or charge upon such lands (2 *Rev. Laws of 1813, 407, § 175*). *Ib.*
  12. By subsequent statutes this lien becomes fixed as an incumbrance, in the nature of a mortgage upon said lands from the time of its entry or record in certain designated offices. *Ib.*
  13. The officers clothed with authority to collect these assessments in New York city, are not required to demand and seek to collect the assessment of the owner of such lands, although such owner is primarily bound and legally liable to pay the same. *Ib.*
  14. Resort may be had primarily to either the land or to the owner thereof; but when the land is resorted to, and the lien or incumbrance created, in the first instance, such action necessarily extinguishes the personal liability of the owner of said land. *Ib.*
  15. In the case at bar, the premises were sold and conveyed on December 5, 1870, by plaintiff to defendant, the plaintiff covenanting that the premises were at the time of the conveyance free, clear, and discharged and unincumbered of all taxes, assessments, and incumbrances. The assessment in question was duly entered, and became a lien upon the premises, December

24, 1870. After the assessment was so entered, the plaintiff paid the same, subject to the agreement of the defendant that he would return the money if the plaintiff was not legally liable to pay the same, and this suit was brought to recover the money so paid. *Held*, by the court, that plaintiff was not liable to pay this assessment. *Ib.*

#### ASSIGNMENT.

1. An order to pay a part of a fund not in existence, will, upon the fund coming into existence, operate as an equitable assignment; but if the fund never comes into existence, the order can only operate as an executory contract to assign, a breach of which may give a right to damages. But to give validity to the order either as an equitable assignment or an executory contract, a consideration is necessary. *Risley v. Smith*, 137.
2. An antecedent indebtedness due by the husband of the drawer of an order payable out of a specified fund to grow due, is not a sufficient consideration. This though the order is accepted by the drawee. *Ib.*
3. A promise by the drawee to pay to the drawer, if the promise is such that the promisee will never have the use, benefit, or enjoyment of anything, is not a sufficient consideration. It is a mere illusion. *Ib.*
4. Forbearance does not form a consideration, where, although a security is taken which does not become payable until the expiration of some term yet to elapse, the actual intention of the parties had no reference to relieving the principal debtor from an action by his creditor. *Ib.*
5. Where the forbearance is not

promised or given at the request of the promisor, but the promisee, gratuitously or voluntarily, or at the request of a third person, promises or gives forbearance, that can not sustain a contract which had no reference to forbearance. *Ib.*

6. A., as agent for a railroad company, procured B. to propose to enter into a contract for the building of the company's road for a certain sum, to wit, two hundred and fifty thousand dollars. At a conversation between A., B., and the president of the company, the subject of A.'s compensation came up, and it was agreed between them that he ought to have five thousand dollars. As the sum to be paid for building the road would exhaust all the available assets of the company, the president asked B. to pay the five thousand dollars. To this B. objected, but the final result was that it was arranged that the five thousand dollars should be added to the contract price for building the road, and that B. should give A. a draft on the railroad company for five thousand dollars payable pro rata as the money should become due to B. under his contract with the company. Thereupon the company and B. entered into a contract whereby B. agreed to construct the road and to run or procure cars to run thereon, and the company covenanted that when B. should complete the road, all the franchises, rights, and property of and belonging to the company should become the property of B. and his associates, and further covenanted to pay B., on such completion, two hundred and fifty-five thousand dollars in certain specified instalments. At the time of the execution of this contract B. gave to A. the order before mentioned, which was then and there accepted by

the president on behalf of the company. There was some evidence that before the arrangement for the order was consummated, the president said that he could possibly get additional subscriptions to the extent of five thousand dollars, if B. would consent to take that amount for the benefit of him (the president) and A. Afterwards the agreement to construct the road was, by the mutual consent of the parties thereto, canceled and annulled before the sum became due B. thereunder. A. demanded payment from B. and the company, which, being refused, he brought an action against B. for the order. *Held*, upon these facts, that there was no sufficient consideration to hold B. liable. *Ib*.

7. The validity of an assignment under the act of 1860, § 348, can not be attacked collaterally on the ground that it was not acknowledged before delivery. *Randall v. Dusenbury*, 174.

See PROMISSORY NOTES, 1, 2.

#### ATTORNEY AND CLIENT.

1. An agreement by a client to pay to his attorney a certain fixed sum is valid; and so is an agreement making either any compensation, or the amount of it, contingent on success in the action. *Porter v. Parmley*, 219.
2. It is the duty of the court to recognize and enforce such agreements when there is no charge of great hardship, extortion, or fraud. *Ib*.
3. The facts that the taxable costs now belong to the party, and that the attorney and client may now enter into agreements as to compensation, such as above stated, does not abridge or affect the power formerly exercised by the court, on summary proceedings to compel payments by an attorney to his client. *Ib*.

4. If the attorney claims under a specific agreement, and the client disputes the existence of the agreement, the court has power to try that question of fact, either on affidavits or the oral examination of witnesses before it, or through the medium of a reference. *Ib*.

5. Such a disposition of the disputed question of fact does not conflict with the constitutional provision as to trials by jury. *Ib*.

6. The exercise of the power does not depend on the insolvency of the attorney, nor on the question as to whether his retention of the money, or his claim thereto, is fraudulent or in bad faith. *Ib*.

See EXECUTION, 18, 19.

#### BAIL.

See ARREST.

#### BILLS OF EXCHANGE.

1. The acceptor of a bill of exchange is liable to the party who, in good faith and for value, discounted the bill before its acceptance. This, although such party knew it was to be accepted for the accommodation of the drawer. *First National Bank of Portland v. Schuyler*, 440.
2. In an action on such acceptance, evidence of previous similar transactions between the parties, that plaintiff in discounting the bill relied chiefly on its being accepted by the drawee, and that the plaintiff at the time of discount had no knowledge that it was not drawn in the usual course of business, is proper if not necessary, as tending to show plaintiff to be a bona fide holder for value. *Ib*.

See PLEDGE, 2; PROMISSORY NOTES.

#### BILL OF PARTICULARS.

1. In an action where the ordering of a bill of particulars is a

matter of discretion, one will not be ordered where, for anything that appears, the defendant is as well acquainted as the plaintiff with the nature and particulars of the claim, and has all the knowledge necessary for him to prepare an answer to the complaint in the form as pleaded. *Powers v. Hughes*, 482.

2. Thus, in an action brought by an administrator de bonis non of P. against the executors of the agent of the administratrix of P. (which administratrix was also deceased) for an accounting of the assets of P., and the proceeds thereof remaining in the hands of such agent at the time of his death, and for the delivery and payment over thereof, the defendant moved upon the complaint and an affidavit of their attorney for a bill of particulars; the complaint alleged that the agent at the time of the death of the administratrix had in his possession a large amount of assets, the property of P., which he had collected and received as agent of the administratrix; that at the time of the death of said agent, the said assets and proceeds thereof, which he had received and collected as before stated, remained in his hands unaccounted for; the affidavit averred that the defendants were ignorant of the particulars of the claim, and that it was necessary and material to this defense, and to enable them to answer, that they should have a bill of particulars. *Held*, a proper exercise of discretion to refuse an order for a bill of particulars. *Ib.*

#### CARRIERS.

1. When goods are shipped with intent to smuggle them, but the carrier is ignorant of the intent, does no act to facilitate it, and is not implicated therein, such unlawful intent forms no defense

to an action by the shipper, against the carrier, for the loss of the goods. *Donovan v. Compagnie Generale Trans-Atlantique*, 519.

2. Under such circumstances, such unlawful intent forms no defense to an action by the carrier, for the freight. *Ib.*
3. Plaintiff brought an action against a common carrier for the non-delivery and loss to her of a certain case of merchandise, delivered to it at a certain time. An answer averring that plaintiff did deliver baggage and merchandise at the time, with the intention of being smuggled, and that on her arrival at the port of New York, she did smuggle ashore from the steamer large quantities, which formed part of her baggage, does not comply with above rule. It is bad, as not distinctly averring that the specific case for the loss of which the action was brought, and which formed the basis of the cause of action, was shipped with such intention. *Ib.*

See RAILROADS.

#### CASES CRITICISED.

- Alger v. Scott*, 54 N. Y. 14. Followed. *Risley v. Smith*, 137.
- Anderson v. Rome, &c., R. R. Co.*, 54 N. Y. 334. Followed. *O'Sullivan v. Roberts*, 360.
- Bowman v. De Peyster*, 2 Daly, 203. Followed. *Schreyer v. Mayor, &c., of New York*, 277.
- Burns v. Erben*, 40 N. Y., 463. Followed. *Wilson v. King*, 384.
- Coddington v. Bay*, 20 Johns. 637. Followed. *McQuade v. Irwin*, 396.
- Dowdney v. Mayor, &c., of New York*, 54 N. Y. 186. Reviewed. *De Peyster v. Murphy*, 355.
- Erben v. Lorillard*, 19 N. Y. 392. Followed. *O'Sullivan v. Roberts*, 360.
- Foshay v. Ferguson*, 2 Denio, 617. Followed. *Wilson v. King*, 384.

- Garlick v. James*, 12 Johns. 146. Followed. *Moody v. Andrews*, 302.
- Gregg v. Howe*, 37 N. Y. Sup'r Ct. 420. Followed. *McMicken v. Lawrence*, 540.
- Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 281. Reviewed and considered. *Worden v. Guardian Mutual Life Ins. Co.*, 317.
- Lawrence v. Kidder*, 10 Barb. 541. Reviewed and approved. *Sander v. Hoffman*, 307.
- Lee v. Ehrhardt*, 19 Law Times, N. S. 637. Reviewed and approved. *Ib.*
- Lennon v. Mayor, &c. of New York*, 55 N. Y. 361. Followed and applied. *Astor v. Mayor, &c., of New York*, 120.
- McGregor v. Buell*, 1 Keyes, 157. Followed. *Eldridge v. Strenz*, 295.
- Musten v. Deyo*, 2 Wend. 426. Followed. *Wilson v. King*, 384.
- Morgan v. Skidmore*, 55 Barb. 263. Followed. *Goldberg v. Dougherty*, 189.
- Muller v. Pondir*, 55 N. Y. 332. Followed. *Moody v. Andrews*, 302.
- Munns v. Nemours*, 8 Wash. C. Ct. 37. Followed. *Wilson v. King*, 384.
- Newton v. Bronson*, 13 N. Y. 587. Followed. *Baldwin v. Talmadge*, 400.
- Phillips v. Wicks*, 36 Sup'r Ct. 254. Followed. *Hoffman v. Treadwell*, 183.
- Roper v. Williams*, 1 Turn. & Russ. 22. Followed. *Trustees of Columbia College v. Lynch*, 372.
- Rundell v. Lakey*, 40 N. Y. 513. Reviewed. *De Peyster v. Murphy*, 255.
- Seibert v. Price*, 5 Watts & S. 438. Followed. *Wilson v. King*, 384.
- Simmons v. Lyons*, 35 Sup'r Ct. 555; 8. O. 55 N. Y. 671. Reviewed and followed. *Schreyer v. Mayor, &c. of New York*, 277.
- Smith v. Smith*, 4 Wend. 468. Reviewed and approved. *Sander v. Hoffman*, 307.
- Turleton v. Stanforth*, 5 T. R. 695. Reviewed and considered. *Worden v. Guardian Mutual Life Ins. Co.*, 317.
- Turner v. Evans*, 2 Ellis & Bl. 512. Reviewed and approved. *Sander v. Hoffman*, 307.
- Want v. Blunt*, 12 East, 183. Reviewed and considered. *Worden v. Guardian Mutual Life Ins. Co.*, 317.
- Warren v. New York Central R. R. Co.*, 465. Followed. *McLain v. Van Zandt*, 347.
- Weaver v. Barden*, 49 N. Y. 294. Followed. *Moody v. Andrews*, 302.
- Wheeler v. Newbould*, 16 N. Y. 392. Followed. *Ib.*

## COMMON CARRIERS

See CARRIERS.

## CONSIDERATION.

See ASSIGNMENT, 1-6; PROMISSORY NOTES, 3, 4, 6, 7.

## CONTRACTS.

1. Where a written or printed contract signed by a party contains in its body a clause such as, "subject to the conditions printed on the other side and which forms a part of this agreement," the conditions thus referred to become a part of the contract. *Van Nostrand v. New York Guaranty and Indemnity Co.*, 78.
2. One must be presumed to know the nature of a contract he signs. *Ib.*
3. Proof of the signature of the party (in the absence of other evidence) is sufficient to establish that he entered into a contract of which the conditions referred to therein formed a part. *Ib.*
4. Evidence which shows neither compulsion, nor fraud, nor absence of opportunity for acquiring the fullest knowledge, nor even absence of notice or know-

- ledge is insufficient to overcome such proof. *Ib.*
5. In an action to recover damages for a delay in the completion of work contracted for within the time fixed by the contract, the fact that a part of the delay which occurred after the time limited for the completion was caused by a strike of the workmen which took place after that time, is no defense to a claim for damages suffered by that part of the delay. *Heater v. Knox*, 109.
  6. In a contract for work and labor, where there is a provision that the work should be completed by a certain date, and be paid for upon completion, and such work is not completed at the time limited for its performance, but is proceeded with afterwards, with the assent of the party for whom the work is being done, a recovery may be had for the work done according to the date of compensation fixed by the contract. *Dillon v. Musterton*, 133.
  7. In such a case "time is not deemed to be of the essence of the contract." *Ib.*
  8. When "time is of the essence of the contract," it must be made to appear so in express terms, and not be left for inference or presumption from doubtful expressions therein. *Ib.*
  9. In the case at bar, if the work had not been completed at the time specified, the party for whom it was to be done could have rescinded the contract at that time, and the other party could not have recovered for the work done. *Ib.*
  10. If the party did not rescind, but allowed the work to go on, he must pay for the same at the rates specified in the contract, and if he required it to be completed within a reasonable time, he must give the other party notice thereof, before he can terminate the same. *Ib.*
  11. Any or all of the several provisions of a written contract can be waived by parol. *American Corrugated Iron Co. v. Eisner*, 200.
  12. A party may always surrender the benefit or advantage of a provision in his favor, and parties may by a new and independent agreement contract for work or materials, other and different from such as may be specified in the original contract, and this may be done by parol. Where the original contract provided for certain certificates from the architect, &c., as to the work being done and the materials being furnished, &c., &c., agreeably to the contract, such provisions will not apply to or affect extra work done in accordance with a subsequent parol agreement, unless such extra work is made subject thereto by an express agreement. *Ib.*
  13. Where a case had had three trials, on a third appeal to the general term, upon a review by the court of the questions presented on the former trials and hearings,—*Held*, that two findings of fact, by the referee, on the last trial, were fully supported by the evidence, and conclusively and properly disposed of the case. *Justice v. Lang*, 233.
  14. These findings are as follows: "That said memorandum or agreement was not delivered absolutely, but only in the expectation and on the condition that a written order should be given by the plaintiff for two thousand rifles, and which was to embrace the one thousand rifles mentioned in said memorandum or agreement, in such a form as to make it a valid contract upon the plaintiff as well as upon the defendants; and that the understanding of both parties was, at the time said memorandum or agreement was

- delivered, that the contract for the said rifles was incomplete and only to become perfect upon the receipt by the defendants of the written order from the plaintiff to procure for him the two thousand rifles mentioned and referred to, of which the said one thousand rifles were a part and parcel." "That at the time when the said defendants made, executed, and delivered to the plaintiff the memorandum or agreement in writing, bearing date on May 13, 1861, the said plaintiff did not accept the said agreement, absolutely and unconditionally, as a completed contract." *Ib.*
15. The defendants sold the goodwill of a provision business, at 228 Third avenue, to plaintiffs, and covenanted with them that they would not engage in a similar business, for five years, within certain limits. Within the stipulated time, defendants resumed and engaged in a like business at 805 Sixth avenue, beyond the limits prescribed. Some of their former customers residing within the prescribed limits sought them in their new place of business, and solicited them to supply them with meats, &c., and they did so, sending their agent or messenger every day to their houses, situate within the limited district, to receive orders, and afterwards filling the orders given. The orders were not originally sought or procured by defendants, but proceeded from the customers. The plaintiffs claimed this to be a breach of the covenant of defendants. *Held* by this court, that the acts of the defendants did not constitute a breach of said covenant. *Sander v. Hoffman*, 307.
16. Such contracts are upheld only when it appears that the public interest or convenience will not be prejudiced. The public comfort and welfare are the controlling considerations. A construction or decision that would make defendants liable under the circumstances in this case, would be harsh and unjust. It would be an unwise interference with the usual course of business and trade, and the requirements of public convenience and comfort, which should never be prejudiced by contracts imposing restraints upon traffic. *Ib.*
17. In this state, many cases have been decided where it has been held, that when a contract not under seal has been made in writing by a person apparently acting on his own behalf, his unnamed and undisclosed principal may sue and be sued upon the same, although the contract was required to be in writing by the statute of frauds; but the principle and rule of these cases fail, in the case of a contract under seal for the conveyance of real estate. An unnamed and undisclosed principal can not be made liable for a breach of such a contract, nor compelled to perform the same specifically, nor can he enforce the same. See the able opinion of the court in this case, for the review of numerous decisions upon this question. *Briggs v. Partridge*, 339.
18. A owning lands contiguous to B, entered into a written and sealed agreement with B, in which each party covenanted that thereafter no buildings but a certain class and kind of dwelling-houses should be erected on their respective lands described in said agreement, and neither they nor their heirs and assigns, or their tenants, or subtenants, should permit, grant, erect, make, establish, or carry on in any manner, on any part of said lands, any stable, school-house, engine-house, tenement-house, or any kind of manufactory, trade, or business whatsoever, or erect or build, or

commence to erect or build, any building or edifice, with intent to use the same or any part thereof for any of such purposes, and that their covenants should bind their assignees and tenants, and the said lands should be forever subject thereto, and should run with the land, &c., &c.

After the death of A, his executor sold and conveyed the premises that belonged to A, and by several conveyances in regular succession, a portion of the same reached C, as owner, each of said conveyances being made subject to the original agreement between A and B.

C erected a building of a different style and character from the kind provided for in said agreement, a portion of which had an entrance and offices for business on another street than contemplated by and covenanted in said agreement, and C's tenant occupied a portion of this building as a dwelling for himself and family, and another portion for an office in the real estate business, and his sub-tenants occupied other portions for other business, all of which was a violation and breach of the covenants of said agreement.

It appeared that this portion of the street (Sixth avenue) was wholly occupied, at the time of the commencement of the action, as a business street, while at the time of said agreement the premises were vacant lots. B brings an action to restrain C and tenants from carrying on business on their premises, because of the covenants in said agreement.

*Held*, That these covenants were binding upon C; but it appearing that A had not suffered any damage, and also that since the covenants had been made, there had been a change of the circumstances, condition, and business in this part of the city,

and that the enforcement of the covenant against carrying on any business on the premises, would conflict with the public welfare and interests, a court of equity should not interfere. It is a well-established rule, that equity will not interpose between parties when a change of circumstances (in regard to the original status of the parties who made the covenant and the subject-matter thereof) renders it inequitable to do so. *Trustees of Columbia College v. Lynch*, 372.

19. Besides, the plaintiff should have interfered at the time the building was being erected, and not wait until the defendant had expended her money. "Every relaxation which the plaintiff has permitted, in allowing the house to be built in violation of the covenant, amounts *pro tanto* to a dispensation of the obligation, &c." *Ib*.

20. A court of equity can not disregard, but must take notice of, the changes that have taken place in certain portions of New York during the past fifteen years, in regard to trade and business, and all contracts which may obstruct the progress of the city in trade, commerce, and population, should be strictly interpreted, and the equitable rights and interests of the individual must yield to the greater equities or interests of the masses, or the public. *Ib*.

21. A contract silent as to terms of performance, requires some act of the parties, such as an offer or demand, to limit the time. Until such act the contract continues open for performance. But upon the doing of such act by one party, the other is bound to respond by performing the covenants to be by him performed on the doing of such act. If he fails so to respond, he is guilty of a breach of the contract, and liable therefor. *Kemple v. Darrou*, 447.



22. No right of action can spring out of an illegal contract, whether it be prohibited by positive law, or is opposed to public policy, or contrary to good morals. *Pease v. Walsh*, 514.
23. Thus when the complaint averred that the plaintiff was employed by the defendant to use his influence with the department of docks, either with all the commissioners thereof, or some one of them, and in such manner as he might see fit and proper for the purpose of procuring a lease of certain piers for the term of one year or more, at as low a rent as fifty thousand dollars per annum, for which use of his influence defendant agreed to pay him fifteen thousand dollars if the lease was procured on those terms; that he had used his influence with said commissioners, had had many interviews with some one of them, and had finally succeeded in procuring a lease from the dock department at an annual rent of forty-five thousand dollars, for one year, with a privilege of a renewal for fifteen years; but did not show the plaintiff's business or profession, or that the services to be rendered by him, were those of a lawyer, broker, agent, or person devoted to any special lawful pursuit, in itself either useful or valuable, *Held*,—that a demurrer to the complaint was well taken. *Id.*

See ATTORNEY and CLIENT, 1-4;  
BILLS OF EXCHANGE; PART-  
NERSHIP, 2-4; PROMISSORY  
NOTES; SALES; SPE-  
CIFIC PERFORMANCE;  
TRUSTS, 1, 2.

#### CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 2, 3.

#### CORPORATIONS.

1. An action at law to recover an

ascertained debt, due by a corporation, will not lie against stockholders holding common stock of the corporation. *Webb v. Vanderbilt*, 4.

2. An action in equity to compel them as stockholders of common stock of a consolidated corporation, to make, or to do any act towards causing to be made, dividends on the stock of one of the consolidating companies of earnings made by such consolidating company prior to the consolidation, the payment of which dividends is claimed to have been assumed by the consolidated company, or to compel them to declare, or do any act towards causing to be declared, a dividend on the stock of such consolidating company, out of the earnings of the consolidated one, will not lie. *Id.*

#### COSTS.

1. If the court before which the final determination in the case was had, does not direct an allowance in its judgment, there is no authority elsewhere to adjudge it. *Eldridge v. Strenz*, 295.
2. The 56th rule of practice limits this application to the court before which the trial is had, or the judgment rendered. *Id.*
3. In the case at bar, the plaintiff recovered judgment after a trial before a jury, and an allowance was made to him. The defendant appealed to the general term of this court, and the judgment was recovered and a new trial ordered. From this decision the plaintiff appealed to the court of appeals, making the usual stipulation required, that absolute judgment should be rendered against him, if the judgment should be affirmed. It was affirmed, and on the remittitur to this court and on affidavit, the defendant moved at special term for an allowance,

and the motion was denied. *Held*, no express provision of the code exists, that provides for an allowance in a case like the present, where a judgment has been rendered by the court of appeals under this form of stipulation; and as, from the nature of the proceeding, it might be often inequitable that there should be an allowance, it is more reasonable to consider that there should not be one granted than to seek for it from analogy and implication. *Id.*

4. The legislature by the word "defense" in the 300th section of the code, meant something more than a case in which an answer or demurrer only was interposed; it never contemplated that in such a case the plaintiff should be subjected to any greater payments of costs, than the usual fixed amount of taxable costs. *Id.*

5. Ch. J. MONELL, in a dissenting opinion, holds substantially that in this and all other like cases, the special term of this court could exercise its discretion after the judgment of the court of appeals, and that in all cases where a defense (by pleading) had been interposed, an allowance to the successful party was within the discretion of the court. *Id.*

6. In the taxation of a bill of costs, including fees paid to a commissioner for the examination of the plaintiff, where the court making the order for the commission made no order for the taxation of the costs, and where no person was examined except the plaintiff, the fees paid to such commissioner should not be allowed. A different practice would lead to abuses difficult to check. *Delcomyn v. Chamberlain*, 359.

7. Costs of appeal will not be allowed to either party, when the judgment below was for too much, and plaintiff on discov-

ering the error offered, soon after the appeal, to make the proper reduction. *Kemple v. Darrow*, 447.

See ATTORNEY AND CLIENT, 3.

#### COUNTER-CLAIM.

See PLEADING, 8, 9.

#### COURT OF COMMON PLEAS.

The clerks of the Court of Common Pleas of the county of New York are not officers of the city and county government. They are a part of the court, which is an incorporeal political being, forming a part of the judicial system of the state. *Landon v. Mayor, &c., of New York*, 467.

#### COVENANTS.

See CONTRACTS, 18-20; LANDLORD AND TENANT.

#### DAMAGES.

See CONTRACTS, 5, 6; LANDLORD AND TENANT, 1-3; TRIAL 7.

#### DEFENSES.

See AMENDMENT; CARRIERS, 1-3; CONTRACTS, 5; COSTS, 4; ESTOPPEL, 2; EXECUTION, 2; FRAUD, 3; MARRIED WOMEN; PLEADING, 1-3, 8-9.

#### DEMURRER.

See MARRIED WOMEN; PLEADING, 4-8, 9.

#### DISMISSAL OF COMPLAINT.

See APPEAL, 25; EXECUTION, 2; NEGLIGENCE, 6-9; TRIAL, 1-2.

#### DOWER.

1. To make adultery operate as a forfeiture of dower, in this state, a judgment dissolving the marriage contract by reason of the wife's adultery is necessary. *Schiffer v. Pruden*, 167.
2. A judgment rendered in an action of divorce a vinculo mat-

trimonii, brought by the husband, adjudging the wife guilty of adultery, but also adjudging the husband guilty of adultery, and adjudging the plaintiff not entitled to a dissolution of the marriage contract, is not sufficient. *Id.*

### EQUITY.

The plaintiff, a married woman, made and indorsed five several promissory notes of five hundred dollars each, for the accommodation of her husband; one of which had been collected after judgment, an action commenced upon another, and separate actions threatened upon each of the others. She claims that she is not liable for the payment of either of these notes, and states sufficient reasons that would amount to a valid defense to any action brought against her on the same, and she prays for equitable relief:—

1. That her signature on the notes be canceled.

2. That she be released from all liability by reason of her signature upon them.

3. That defendant be enjoined and restrained from commencing or maintaining any action against her on account of said notes.

*Held*, that under the decisions and under the principles of equity, as adjudicated and understood, nothing appears in the facts of this case that will give a court of equity jurisdiction. The remedy of the plaintiff is perfect, and attainable in a court of law, in her answer to any action brought on these notes or any one of them. *Hoffman v. Treadwell*, 183.

See ASSESSMENTS, 1; CONTRACTS, 18-20; CORPORATIONS, 2; SPECIFIC PERFORMANCE.

### ESTOPPEL.

1. The fact that a party who has

an interest in having certain work well done, and the materials furnished therefor of a certain quality, stands by and sees work done and materials used of a character inferior to that called for, will not operate as an estoppel or waiver of his right to thereafter object, where it does not appear that the party has sufficient knowledge to enable him to detect the defects and make the proper objections thereto. *Heater v. Kuo-z*, 109.

2. Persons acting under the claim or pretense of being trustees, who have, in proceedings instituted by them, secured the fruits of the services of one employed by them, are estopped from shielding themselves against liability for payment for such services out of such fruits, on the ground that their acts were unlawful and void. *Randall v. Dusenbury*, 174.

3. A judgment in an action brought pursuant to the provisions of § 32, article 2, title 3, ch. 8, part 3, R. S., relative to charging heirs and devisees with the debts of the decedent, to the extent of the estate, interest, and right in the real estate descended to them from, or devised to them by, such decedent, to charge certain real estate with a debt due the plaintiff by a decedent, estops the parties defendant and their privies from thereafter disputing that the decedent had such estate, interest, and right in such real estate, as she was by the complaint in such action alleged, and by the decision thereof adjudged to have. *Hudson v. Smith*, 452.

4. A judgment of a court of competent jurisdiction upon any fact, title, or question distinctly put in issue or directly involved in the suit, is conclusive in any other action between the same parties or their privies, in respect to the same fact, title, or question. *Id.*

## EVIDENCE.

1. Proof of the signature of a contract by the party (in the absence of other evidence) is sufficient to establish that he entered into such contract. *Van Nostrand v. New York Guaranty and Indemnity Co.*, 78.
1. Evidence which shows neither compulsion, nor fraud, nor absence of opportunity for acquiring the fullest knowledge, nor even absence of notice or knowledge, is insufficient to overcome such proof. *Ib.*
3. Where the issue is whether articles delivered were of sufficient weight, and the defendants proved that they weighed the articles, but failed to give any proof of a legal kind that they were less in weight than as charged for, such failure leads to the affirmation and not doubtful conclusion that the bill charged for the right weight. *Parsons v. Sutton*, 544.
4. Testimony is not to be regarded as undisputed, although not specifically controverted, when there is enough in the case to allow of its construction in connection with the other facts, and to justify the results that although the witness was in general credible, yet he was incorrect as to the particular testimony in question; as where a witness swears that the work set forth in a certain bill was extra, when it is quite plain from the face of the list that it contains many items which could not have been extra work. *Johnson v. Williams*, 547.

See APPEAL, 26-30; BILLS OF EXCHANGE, 2; EXECUTION, 4-7; PROMISSORY NOTES, 1; TRIAL, 3-5, 7.

## EXCEPTIONS.

See APPEAL, 24.

## EXECUTION.

1. Where, at a sale of real estate under execution, property of the value of thirteen thousand dollars was sold for one hundred and eighty dollars (the judgment being for one hundred and three dollars) and the attorney of the judgment creditor procured a person to become the nominal purchaser, and then set on foot and conducted an ingeniously contrived system of leases, mortgages and deeds, fair and valid on their face, but in reality wholly fictitious, and on the trial of the action to set aside the execution, neither the said attorney, nor the last grantee who was in court were called to sustain the bona fides of the transaction, and explain the suspicious circumstances,—*Held*, that the judgment at special term, setting aside the sale, was correct, although the judgment and proceedings leading thereto, and the execution and sale thereunder and proceedings leading thereto, were fair and regular on their face. *Bruce v. Kelly*, 27.
2. A bond of indemnity to the sheriff recited the recovery of a certain judgment, and the issue of an execution thereon to the sheriff against the property of the judgment debtor, and then further recited: "Whereas certain personal property that appears to belong to the said judgment debtor against whom said execution has been issued, as aforesaid, is claimed by some other party or parties," and was conditioned to save the sheriff, and all persons aiding him, from all harm, &c., that might arise, &c., against him or them, "as well for the levying, attaching, and making sale under and by virtue of such execution of all or any personal property which he or they shall or may judge to

belong to said judgment debtor, as in entering any shop, store, building or other premises for the taking of any such personal property."

In an action against the sheriff and the sureties in the bond for the conversion of property claimed by the plaintiff, where the answer of the sureties, after a general denial, in a separate affirmative defense, claims that the property for the taking of which the action is brought was the same property which was levied on under an execution issued in a certain described action, the description of which is the same as the description contained in the bond of the action therein referred to, and further claims that such property belonged to the judgment debtor in the judgment described in the answer; and the efforts of all the defendants (being the sureties, the sheriff, and the deputy who made the levy) are directed at the trial to elicit and establish the facts that the property in question was in the possession of and used by the judgment debtor, that it apparently belonged to him, that he had really a leviable interest therein, and that it was rightfully levied on, — *Held*, that a prima facie case was presented, that the sheriff had not only levied on the property claimed by the plaintiff, but that he had judged that it belonged to the judgment debtor, and a motion by the sureties to dismiss the complaint was properly denied. *Chapman v. O'Brien*, 244.

3. If, at the conclusion of the whole testimony, a doubt remained whether the levy was within the authority conferred by the bond, the jury should be directed to determine the fact. *Ib.*

4. In an action against the sheriff for trespass in levying upon goods claimed to be owned by A. under

an execution against B, proof that A. bought the goods of H. at a time when he was sole owner thereof, is not decisive on the issue of A.'s ownership. If A. in fact acted on behalf of B. in making the purchase, then A. would not be entitled to recover. *Pollock v. O'Brien*, 477.

5. Proof that A. had means and B. had none, is admissible, and questions tending to show these facts are proper. *Ib.*

6. The deputy-sheriff who made levy was asked, "if he saw anybody that was in charge of the place at the time he went to levy?" *Held*, that the question was correctly allowed under a general objection. And the witness answering that he judged the plaintiff's husband was in charge, not being objected to, does not render the allowance of the question or the reception of the answer, error. *Ib.*

7. The defendant having called out the fact that plaintiff's husband was in charge, plaintiff was entitled to have from the witness who testified to that fact, testimony as to what was said at the time. *Ib.*

8. Upon a sale of real estate under execution, it is the sheriff's duty in regard to selling in parcels, to learn the situation of the property before he sells, and to sell in obedience to the direction of § 38, art. 2, title 5, chap. 6, part 3, R. S. *O'Donnell v. Lindsay*, 528.

9. In some cases the facts will be such that the exercise of the sheriff's discretion will be judicial in its nature. *Ib.*

10. In such cases an honest exercise of the discretion is as final as the action in like case of any judicial tribunal. *Ib.*

11. The non-performance of this duty does not render the action of the sheriff void, but only voidable, at the instance of the aggrieved party. If the non-

- performance had given cause for setting aside the sale, such will be its effect as against a purchaser who had notice of the non-performance, and much more against a purchaser who had requested and led the sheriff to make the sale in the forbidden manner. *Ib.*
12. If the facts were such that the sheriff might have so exercised his discretion as that but a part of the lot would have been sold, and he did not exercise his discretion at all, but relied on the purchaser for information; *semble*, the sale should be treated as invalid. *Ib.*
13. *Sembla*, an execution for one hundred and seventy dollars, and a lot thirty-seven by one hundred, would call for the exercise of discretion. *Ib.*
14. *Query*, whether the sheriff could exercise any discretion if the lot was in the city of New York, and was twenty-five by one hundred. *Ib.*
15. *Query*, when there is erected on one lot in the city of New York, twenty-five by one hundred, two buildings separated by a space of twenty feet, both occupied as tenement houses, each independent of the other, and each having a rental as large as many houses occupying full lots, and the entrance to the rear house being through an alleyway on the side of the lot passing for a part of the way under the beams of the floor of the second story of the front building, and it being the most advantageous mode of selling, so as to make the property produce the most, to sell the houses separately, it is doubtful whether the statute gives the sheriff power to make a sub-division. *Ib.*
16. Inadequacy of price, of itself, although it is so great as to be at least on the verge of a presumption that there was in the contract of sale some undiscovered violation of plaintiff's rights, is not enough. There must be some other circumstance in addition. *Ib.*
17. But great inadequacy has refined the ingenuity of learned judges, in extracting from the facts sufficient to justify annulling the sale. *Ib.*
18. The fact that the attorney for the judgment plaintiff furnished the description by which the property was sold, and himself became the purchaser, is sufficient to annul the sale. *Ib.*
19. When the purchaser is the attorney for the execution plaintiff, and he has managed or controlled a part of the preliminaries to the sale,—*e. g.*, furnishing a description of the property by which it was sold,—he will be deemed to hold the property as trustee for the owner. *Ib.*
20. When the description bounds the property, with one exception, by lots on a map, and stating where a map was, the excepted boundary being a lot stated to be now as late the property of Van Siller, and gives no alleged quantity of land offered for sale, it has not the quality of common certainty for the purposes of the notice of sale required by the statute. *Ib.*
21. Laches, &c., on the part of the owner does not relieve his trustee from the fulfillment of the trust. *Ib.*
22. The owner may either
1. Move in the action in which the execution was issued; or
  2. Bring an original action in equity. *Ib.*
- See SHERIFFS.
- FALSE IMPRISONMENT.
- See MALICIOUS PROSECUTION.
- FRAUD.
1. When property has been obtained by an active, fraudulent

- combination, all the guilty parties are answerable for the whole of it. If co-defendants are entitled to any adjustment of liabilities between themselves, the attention of the court must be called to it. *Bruce v. Kelly*, 27.
2. Fraudulent representations, made by one member of a firm, which induced the purchase of property from the firm, creates a liability wholly disconnected from the liability of the firm upon the contract made with them. For the fraud the member of the firm committing the same is alone liable to the person injured. *Goldberg v. Dougherty*, 189.
3. The recovery of a judgment against the firm (by the person defrauded) upon the violation of the contract, is no defense to an action against the individual member of the firm for the fraud. The causes of action are several, and the obligation or liability incurred by the individual member, by his deceit, is an additional and separate security to the purchaser. *Id.*

#### GENERAL TERM.

See **APPEAL**, 2, 8, 9.

#### INJUNCTION.

See **ASSESSMENTS**, 7 8.

#### INSURANCE.

1. The policy of insurance in this case designated the first days of March and September as the time for the payment of the semi-annual premiums, and then proceeded to declare that the premiums shall be paid on or before the days upon which they become due, or within thirty-five days thereafter. It then provided that in case of a violation of any of its provisions, it should become null and void. It also contained a provision, that from the amount paid in

case of death, there should be deducted the balance of the year's premium, and all indebtedness of the assured, also a provision for the issue to the assured of a paid-up policy, for a pro rata amount of the whole amount issued, in case the assured discontinued payments of premiums after the payment of the first annual premium. The policy also had printed prominently on its face the words "Non-forfeiting life policy." The assured paid two semi-annual premiums on this policy that became due, to and including the 1st day of September, 1873. The premium due on the 1st of March, 1874, was not paid on that day, but was paid on or about the 24th day of March 1874, by the plaintiff, brother of the assured, under the following circumstances. On the 21st or 22nd day of March, 1874, the brother of the assured received a letter from him (then residing in Virginia) requesting him to send to the company the amount of the semi-annual premium due on the 1st of March, 1874, before the expiration of the thirty-five days from the 1st of March, 1874. Before the premium was paid in pursuance of said letter, and after the said brother had received a telegram announcing the death of the assured, and on the 24th day of March, 1874, the said brother in pursuance of the request in said letter, sent by mail to the company, the semi-annual premium, due March 1, 1874, but without notifying the company of the death of the assured, and the company gave a receipt for the same without knowledge or information of the death of the assured; but afterwards and on the 31st of March, 1874, the company wrote to the said brother: "Death having occurred while the premium was unpaid, the policy is not binding

on the company, and the premium remitted on the 24th is held subject to your order, or of the legal representatives of George P. Worden" (the deceased and assured). *Held*, that an omission to pay the premium on this policy at the day provided therein, violated no condition of the policy, until thirty-five days thereafter had elapsed. The insurance was in full force and effect for six months and thirty-five days after the 1st of September, 1873, without the payment of any further or additional premiums than had been paid, and the assured was protected during that time, and the defendant would have been liable on the policy if the premiums had not been paid at all (the assured died before the expiration of this time). That the payment was made in accordance with the instructions of the assured, during his life-time, and there was no bad faith on the party acting for the assured, in complying with his request, and no undue delay in the payment in view of the time in which he had to comply with the terms of the policy. The right to pay in this case was not personal to the assured, and could be delegated by him to and paid by another. Judgment was rendered against the company defendant for the amount of insurance provided in the policy. *Worden v. Guardian Mutual Life Ins. Co.*, 317.

2. The barque "Lindo," was insured for the voyage, "at and from Miramichi, to a port in Cape Breton, and at and thence to New York." The vessel sailed from Miramichi, November 24th, 1864, bound for Big Glace Bay, a port in Cape Breton, having cleared at the Custom House in Newcastle (within which district Miramichi lies) for the port of Big Glace Bay, under a certificate

from the collector to that effect, consigned to the agents of the Clyde Mines, at Big Glace Bay, to load coal at that port for New York, under a written charter, dated November 18, 1864, by which the owner agreed with Halls & Creed, agent of the mines, that the said vessel should receive on board a full cargo of coal in bulk, which the charterers agree to furnish "at Clyde Mines, Big Glace Bay, C. B.," and being so laden to sail to New York, for three dollars and seventy-five cents, gold, per ton. By the charter it was also stipulated that "if on the arrival at Big Glace Bay, the captain does not consider it safe to remain and load, then he is to be at liberty to proceed elsewhere, and this charter to be considered canceled." On the evening of November 25, the vessel having passed the North Cape of Cape Breton, and at ten o'clock P. M. Sydney light then bearing west about three miles the captain concluded to put into Sydney, a port in Cape Breton, and lying off and on till morning entered that port and anchored there November 26. There was no storm or stress of weather which required him to put into Sydney. There the vessel remained sixteen days, until December 12, when she sailed for Cow Bay, a third port in Cape Breton, and while loading there with coal for New York, a sudden storm drove her upon the rocks, constituting the alleged loss. *Held*, that the act of the master taking the vessel to Sydney, to Cow Bay (a second port of Cape Breton) was a deviation from the voyage for which she was insured. The master had a right to select a port of Cape Breton, but his right and the rights of the bark were exhausted by the use of one port. He could not enter one for the purpose of selecting



another, or afterwards proceed to another port from the one first entered. If the use of the first port was a part of the voyage, then the act of seeking and taking another was a deviation. If the first port was not a part of the voyage, then the act of seeking it was a deviation in itself. *McCull v. Sun Mutual Ins. Co.*, 332.

3. The facts in this case show the vessel upon a reef at Cow Bay on the coast of Cape Breton, a dangerous coast, at a season when there was the greatest probability of gales and destructive seas, and the vessel on the rocks under a high and precipitous cliff, and confirm the oral testimony that she could not have been taken off, and was a total loss, subject only to a chance that she might survive the winter tempests and waves. *Held*, that this mere chance (which was sold at public action) did not forbid the conclusion that under this policy the loss was total. If the facts had been submitted to the jury, a finding contrary to this conclusion of the court would have been against a decided preponderance of the testimony. *Ib.*

4. By the policy, it was also warranted, that the vessel was commanded by a captain holding a certificate from the American Shipmaster's Association. The bark was not so commanded, but this fact was made known to the insurers by the insured, and the policy made and delivered, and the premium paid upon the condition that this vessel was a foreign vessel, and it should not or would not apply. *Held*, that the insurers dispensed with such a certificate, and waived the same. *Ib.*

#### JUDGMENT.

1. Upon the trial of an issue of  
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fact by the court, its decision shall be given in writing, &c. (*Code* § 267). The decision is a judicial act, and is complete when reduced to writing. Whatever remains to be done, is a mere clerical act to be done by the clerk, to wit, entry of judgment. *Roberts v. White*, 272.

2. Reducing the decision to writing concludes the trial, and authorizes the judgment and completes the official act of the judge, and the decision could be filed and the judgment be entered by the clerk at any time afterwards. The expiration of the judicial term of the judge, after the decision, yet before such filing of the same and entry of the judgment thereupon, would not make such entry irregular. *Ib.*

3. A decision in writing that contains more than is authorized by law, may be modified by the court, on the motion of the party in whose favor it was rendered, by omitting therefrom so much as was erroneous, and retaining so much as was authorized by law. *Ib.*

4. The special term can thus modify a decision, and direct the clerk to enter a judgment upon it, in a modified form. *Ib.*

5. The party against whom the same was rendered, is not prejudiced by such a modification and entry. But such a judgment should not be entered as of an anterior date. Such an entry might affect the rights of others not parties. *Ib.*

6. Defendants, on the 4th of November, 1874, offered to allow judgment to be taken against them for seven hundred and fifty dollars, with interest and costs, which offer was not accepted, and defendant afterwards answered, contesting plaintiff's claim for all sums beyond the said seven hundred and fifty dollars. Plaintiff

moves for an order that the defendant pay to him the amount of said offer. *Held*, that since the amendment of § 244 of the code (in 1857), such an application has been and should be granted. *Wireman v. Remington Sewing Machine Co.*, 314.

7. This is a substantial right when the answer "admits part of the plaintiff's claim to be just, and in conformity to § 244 of the code, it being in the nature of a right to a judgment; and, therefore, no question arises as to whether a party can appeal from an order affecting it. *Ib.*

8. Upon the question whether the court has the power to suspend the entry of judgment, after a trial and verdict, except in the cases named in § 265 of the code,—*Held*, that the court has the necessary control over its judgments, that in the exercise of a sound discretion, it may suspend, vacate, or amend them. This power is incidental, and necessary to the orderly and equitable administration of justice. *Alfaro v. Davidson*, 408.

9. A judgment in an action brought pursuant to the provisions of § 32, article 2, title 3, ch. 8, part 3, R. S., relative to charging heirs and devisees with the debts of the decedent, to the extent of the estate, interest, and right in the real estate decedent to them from, or devised to them by, such decedent, to charge certain real estate with a debt due the plaintiff by a decedent, estops the parties defendant and their privies from thereafter disputing that the decedent had such estate, interest, and right in such real estate, as she was by the complaint in such action alleged and by the decision thereof adjudged to have. *Hudson v. Smith*, 452.

10. A judgment of a court of competent jurisdiction upon any fact, title, or question distinctly

put in issue, or directly involved in the suit, is conclusive in any other action between the same parties or their privies, in respect to the same fact, title, or question. *Ib.*

See FRAUD, 2, 3.

#### JUDICIAL NOTICE.

See CONTRACTS, 20.

#### JUDICIAL SALE.

See EXECUTION 1, 8-22.

#### JURISDICTION.

1. An act of the legislature which merely affects a remedy is not in conflict with the provision of the constitution (art. 6, § 12) which continued the superior court with the powers and jurisdiction that it held and possessed at the time of the adoption of the constitution. *Rae v. Mayor, &c., of New York*, 192.

2. The legislature has always, and rightfully, assumed the power to change the forms of proceedings and remedies, and to limit them to certain tribunals, and any general law affecting the mode of obtaining a remedy, can not be construed into an infringement of constitutional jurisdiction or power. *Ib.*

3. The Superior Court, as a court of equity, has the same jurisdiction as the late court of chancery of this state, in actions to compel the specific performance of contracts for the purchase and sale of real estate, where the parties to the action have been brought within its jurisdiction by service of process or otherwise. *Baldwin v. Talmadge*, 400.

4. The late court of chancery exercised such a jurisdiction (see the cases cited in the points of counsel and the opinion of the court). *Ib.*

5. The provisions of the code are not applicable, when land which

is the subject of the action lies out of the state. *Ib.*

See EQUIT.

#### LANDLORD AND TENANT.

1. When a lessor owning a building and being about to erect a new one adjoining it and to be connected with it, leased the old one and the one to be erected for hotel purposes, covenanting to make certain repairs in some of the rooms in the old building and to finish the new building (which should contain a certain number of rooms), by a specified time, and that such rooms should be ready for occupation, and possession thereof should be given by such specified time, and the rooms were not ready for occupation until some time after the specified period, — *Held*, the evidence showing that rooms in a hotel, both furnished and unfurnished, have their value for use, varying with certain periods of the year, which is known and provable, that the lessee's measure of damages was the proved value of the use of furnished rooms, for such of the rooms for which he had furniture, and for the others the proved value of unfurnished rooms. *Hexter v. Knox*, 109.
2. This measure is not open to the objection that it involves the allowance of contingent profits for the use of the furniture, or of profits contingent upon the use of the hotel by guests. The allowance for the value of the use must be varied according to the season of the year. *Ib.*
3. Upon breach of a covenant by the lessor to repair, to restore, to put in order, or to replace old appurtenances with new, the lessee, at his option, has the right to make the repairs, &c., being judicious and reasonable in his expenditure, and recover the expense from the landlord, or omit to make the repairs, &c., and sue for his damages. *Ib.*
4. Where the lease, for the purpose of giving a security for the rent, contains this clause, "A lien shall be given by the said lessee to the said lessor to secure the payment thereof" (that is, of the rent) "on all the furniture that shall be placed in said hotel by said lessee," an equitable lien is not raised. *Hale v. Omaha National Bank*, 207.
5. One who, without notice of the lien, takes a mortgage to secure a prior indebtedness due him by the mortgagor, and by the mortgage extends the time of payment, is a bona fide incumbrancer for value, and takes free of an equitable lien. *Ib.*
6. Where, by the subject clause, property is transferred subject only to certain specified liens, there is a strong inference that all other liens which may be held by the transferor are waived. *Ib.*
7. Where a building having windows overlooking vacant premises owned by the lessor is demised, "with the appurtenances," by a lease containing only a covenant for quiet enjoyment, the lessee acquires no right against the lessor, or those claiming under him, to have the windows remain unobstructed for the passage of light and air, or any other purpose. *Doyle v. Lord*, 421.
8. Such a right does not pass under the clause, "with the appurtenances." This, although the vacant premises are situated in the rear of the building and have erected on them a privy (constituting what is ordinarily termed a yard), it appearing that the lessee had no right to the use of the privy nor of access thereto. *Ib.*
9. Consequently the lessor, or those claiming under him, are at lib-

- erty to place an erection on such vacant premises, although the effect is to entirely obstruct the windows of the demised house which overlooks the vacant premises. *Ib.*
10. These rights are not affected by the facts, that the lessor had covenanted to put iron bars in the windows; had for a valuable consideration granted to an adjoining owner the privilege to put windows in his building looking into the rear premises, and had covenanted not to obstruct such windows; that the lessee was restricted by the demise to him, to using the demised premises for a particular business, for which business the light from the windows was highly desirable and beneficial, the sales largely depending on it; that the lessor had subsequently leased the vacant premises to the party who was putting up the erection complained of, making such subsequent lease subject to the prior one, and providing in the subsequent lease that the lessee therein should not interfere with the lessee in the prior lease, in the occupation of the premises thereby demised. *Ib.*
11. The English doctrine of ancient lights does not obtain in the state of New York. *Ib.*
12. M., by his agent J., leased certain premises to an Insurance Company. The lease contained the following clause: "The one-third, at least, of the front water-table . . . is reserved for signs for the tenants of the rear offices, and such amicable arrangement for signs on the side entrance as may be agreed for." M., by the same agent, afterwards leased the offices in the rear to K., and at the time of delivery to K. of his lease, also handed him a slip of paper on which was printed the above clause in the lease to the Insurance Company, so that K. might understand what rights he had, and what the conditions of the lease to the Insurance Company were. On both leases was endorsed the following rule: "No sign, advertisement, or notice shall be inscribed, painting or affixed on any part of said outside or inside of said building, except of such color and size in such places upon or in said building as shall be first designated by said lessor and endorsed hereon." Held, that K. took subject to the above clause in the lease to the Insurance Company; and as to signs on the side entrance was bound to endeavor to effect an amicable arrangement with the Insurance Company. *Knoepfel v. Kings County Fire Ins. Co.*, 553.
13. Under such a clause, an action in equity by K. respecting signs on the side entrance was not maintainable, unless K. had used all reasonable endeavors and exhausted all the means in his power to bring about an amicable arrangement with the Insurance Company. He was not relieved from this duty, by having been insulted by one of the officers of the company about a month before he attempted to put up his signs (even if such were the fact). *Ib.*
14. Such an action as to signs on water-table was not maintainable when the Insurance Company at all times conceded to the plaintiff in respect thereof all that the court finds him entitled to. *Ib.*

#### LIEN.

As to the right of a party in possession, claiming ownership, to pay off a lien and claim a subrogation; see remarks of MONELL, Ch. J., in *Hudson v. Smith*, 452.

See ASSESSMENTS, 12-14; LANDLORD AND TENANT, 4-6; MORTGAGES.

## LIMITATIONS OF ACTIONS.

1. A promissory note of a third party, payable at a future time, endorsed and delivered by a debtor in payment of or as security for a part of his indebtedness, operates to take the case out of the statute of limitations, as of the day of its delivery to the creditor, not as of its payment. *Smith v. Ryan*, 489.
2. A payment on account, or a transfer of a security as collateral security on record, operates to take a case out of the statute only by reason of a promise implied from the act, to pay the balance. Such a promise can be implied only from the act of the debtor himself or his authorized agent. In the case at bar, the only act done by the defendant was the transfer of the notes; the payment of them at maturity by the makers was not the act of defendant or of his authorized agents. The payment by the makers was not made as agents of the defendant, but in discharge of their principal debt, pursuant to their legal obligations. *Id.*

## LITERARY PROPERTY.

1. Words which in their ordinary and universal use denote the virtues, such as "Charity," "Faith," can not ordinarily be appropriated by any one as a title or designation for a book, play, &c., written, &c., by him, treating or enforcing, symbolizing, &c., a virtue, to the exclusion of any other person who may write, &c., a book, play, &c., treating upon, enforcing, symbolizing, &c., the same virtue *Isaacs v. Daly*, 511.
2. There may be cases where a title is not made use of in bad faith, or to promote some imposition, or to inflict a wrong, when a court of justice should interfere to prevent its use or to compensate a party who has in

consequence sustained an injury. *Id.*

## MALICIOUS PROSECUTION.

1. Malice and want of probable cause must be proved to sustain an action for malicious prosecution and false imprisonment. It is well settled, that if malice had been expressly proven, that the action could not be maintained unless the plaintiff also established that there was no probable cause for the arrest. If it appears that the plaintiff was wholly innocent of the charge preferred, yet his action will be defeated, if defendant proves that he had reasonable grounds to believe that plaintiff was guilty at the time defendant made his complaint, and caused plaintiff's arrest. *Wilson v. King*, 384.
2. On the review of the facts in the case at bar, the court held that probable cause for the defendant's action was fully established, and justified the dismissal of the complaint. *Id.*
3. The fact that the officer arrested plaintiff without a warrant, was no ground for sustaining the action. Although no felony had in fact been committed, the officer had reasonable grounds to believe that one had been committed, and acted in good faith and without evil design, and was, therefore, authorized to make the arrest without a warrant. The question of malice and probable cause is one of law for the decision of the court, and not one of fact for the jury. *Id.*

## MARRIED WOMEN.

1. The plaintiff, a married woman, made and indorsed five several promissory notes of five hundred dollars each, for the accommodation of her husband; one of which had been collected after judgment, an action com

menced upon another, and separate actions threatened upon each of the others. She claims that she is not liable for the payment of either of these notes, and states sufficient reasons that would amount to a valid defense to any action brought against her on the same, and she prays for equitable relief:—

1. That her signature on the notes be canceled.
2. That she be released from all liability by reason of her signature upon them.
3. That defendant be enjoined and restrained from commencing or maintaining any action against her on account of said notes. On the demurrer of the defendant alleging that the complaint did not state facts sufficient to constitute a cause of action,—*Held*, that although the plaintiff incurred no legal obligation by her indorsement, &c. (*Philips v. Wicks*, 86 *Super. Ct.* 254), and has a valid defense to any action upon them, she can not relieve herself of the obligation in a court of equity. She must wait until she is summoned before a court of law, when her defense interposed will be heard, and her legal rights declared. *Hoffman v. Treadwell*, 183.
2. Under the decisions and under the principles of equity, as adjudicated and understood, nothing appears in the facts of this case that will give a court of equity jurisdiction. The remedy of the plaintiff is perfect, and attainable in a court of law, in her answer to any action brought on these notes or any one of them. *Ib.*

#### MORTGAGES.

Where a mortgagee of chattels, whose right to possession has become perfected under the mortgage, obtains possession in

a lawful manner, and sells the property generally without taking any notice of a prior lien or mortgage, he is not liable in trespass or trover at the suit of the mortgagor or the prior lienor or mortgagee. *Hale v. Omaha National Bank*, 207.

#### MOTIONS.

1. Upon a motion to dismiss a complaint on a particular ground, if that ground is untenable, and there is no other ground which is incapable of being obviated, a denial of the motion is proper. *Raynor v. Hoagland*, 11.
2. Upon the denial of such a motion, if no other motion or request is made, and no evidence given on the part of the defense, the court can not do otherwise than direct a verdict for the plaintiff. *Ib.*
3. Defendants, on the 4th of November, 1874, offered to allow judgment to be taken against them for seven hundred and fifty dollars, with interest and costs, which offer was not accepted, and defendant afterwards answered, contesting plaintiff's claim for all sums beyond the said seven hundred and fifty dollars. Plaintiff moves for an order that the defendant pay to him the amount of said offer.—*Held*, That since the amendment of § 244 of the code (in 1857), such an application has been and should be granted. *Wireman v. Remington Sewing Machine Co.*, 314.

See APPEAL, 2, 17–19, 24, 25, 28; JUDGMENT, 3, 4, 6, 7; NEW TRIAL; REFERENCE, 3–6.

#### MUNICIPAL CORPORATIONS.

Where the duties of an employee of a municipal corporation do not absolutely require his presence every day at the office of another officer of the corpora-

tion, the fact that his omissions to be present are numerous, his attendance not being necessary to the faithful discharge of his duties, forms no defense to an action for his salary. *Whitney v. Mayor, &c., of New York*, 106.

See NEW YORK CITY.

### NEGLIGENCE.

1. Where the pledgee of goods left the goods in a warehouse selected by the pledgor (which was a suitable place), under the charge of warehousemen who had previously been co-partners with the pledgor, and who had sustained good reputations up to the time of their subsequent absconding, and employed an agent who periodically visited the warehouse and examined the goods to see that they were properly stored and protected, and kept in proper condition, his last visit being about a week before the absconding,—*Held*, that the pledgee was not guilty of gross negligence, and therefore not liable for the value of the goods stolen or misappropriated by the absconding warehousemen. *Van Nostrand v. New York Guaranty and Indemnity Co.*, 73.
2. If a street railway car is at rest or on the point of rest, although some motion remains, the getting on by a passenger at the front instead of the rear platform is not, as matter of law, contributory negligence. *Maher v. Central Park, North & East River R. R. Co.*, 155.
3. If the evidence leaves it uncertain as to whether the motion was not so great as to make it unsafe for a man of common prudence to get on the car, the question should be submitted to the jury. *Id.*
4. The hurrying-up of the horses while a passenger is in the act of getting on, and before he is

fairly on, is evidence of negligence to go to the jury. *Id.*

5. Where there was evidence that at the time a passenger was getting on a car by the front platform, the car was at rest or on the point of rest, and that the driver invited the passenger to get on by the front platform, and the court charged the jury that they should find for the defendant, unless the proof showed that the car was stopped or being stopped, and further charged that the front platform is a place of danger, and the occupation of it or an attempt to get on by it is prima facie evidence of danger, unless the passenger is invited so to do by a servant of the company,—*Held*, that the qualification as to the invitation must be considered as applied to the case of a passenger attempting to get on while the car was at rest or the point of rest. In this aspect the charge was a more favorable one to the carrier than he had a right to ask for. *Id.*

6. In this case the complaint was dismissed on the motion of the defendant at the trial, when the plaintiff had rested, for the reason that the plaintiff's case had failed because it clearly appeared that the plaintiff's negligence had contributed to the injury. The plaintiff asked the court to submit the question to the jury and the court refused. On the argument at general term, the main point of error claimed by the appellant, was the refusal of the court to submit the question of the plaintiff's negligence to the jury; that thereby the plaintiff had been denied the right of a trial by jury, and been compelled to submit her claim to the decision of a single judge. *Held*, by the court, that if the evidence on the trial clearly established the plaintiff's negligence, and was undisputed, and the inference

from that evidence indisputable, the court can pronounce the law applicable without going through the form of taking a verdict of the jury on the point. *McLain v. Van Zandt*, 347.

7. The plaintiff must make a prima facie case, must show that the injury was not caused partly by negligence with which the plaintiff was chargeable. *Ib.*
8. If there is an entire want of proof as to the care the plaintiff used, the complaint should be dismissed. *Ib.*
9. On the whole case, it appearing clearly that the child was non sui juris, and the father negligent, the dismissal of the complaint by the court was affirmed. *Ib.*

#### NEW TRIAL.

1. Where upon a motion for a new trial, on the ground of newly discovered evidence, the case made by the affidavits is to a great extent neutralized by opposing affidavits, and the credibility of the affiants for the moving party is materially impaired by retractions, explanations, and qualifications made by some of them in subsequent affidavits, in which they also stated the manner in and inducements under which these prior affidavits had been procured, and other suspicious circumstances appeared, such as that several of the affiants could not be found at the places of residence given by them; that one denied that he had signed or sworn to any affidavit; that another had admitted that the affidavit made by him was untrue, and had been made for a money consideration; that the moving party had paid out considerable money, and had agreed with one of the affiants to pay him a large sum for the discovery and procuration of testimony
- sufficient to obtain a new trial, the motion should be denied. *Chapman v. O'Brien*, 244.
2. Upon a motion for a new trial on the evidence, the fact that the party did not call the attention of the court to his claim that the weight of the evidence as matter of law called for a verdict in his favor is sufficient cause for denying the motion. *Pollock v. Brennan*, 477.

#### NEW YORK CITY.

1. The clerks of the court of common pleas of the county of New York are not officers of the city and county government. They are a part of the court, which is an incorporeal political being, forming a part of the judicial system of the state. *Landon v. Mayor, &c., of New York*, 467.
2. The officers whose salaries the board of apportionment has power, under ch. 583 of the act of 1871, to regulate, are those who form a part of the political government of the city and county of New York, and are connected with the executive or legislative departments; and not those who are a part of the judicial system of the state. *Ib.*
3. Therefore the board has no power to reduce the salary of the deputy clerk of the court of common pleas for the city and county of New York. *Ib.*
4. That a power has been exercised can not be inferred or implied from the fact that a power, not coupled with a duty, has been conferred. *Oakley v. Mayor, &c., of New York*, 549.
5. The resolution of the board of supervisors of New York city, "that all losses which may be sustained by the default of any of the collectors of the several wards of the city be charged to the said wards, respectively, and added to the taxes of said ward this year," passed under author-



ity of the act of 1837, ch. 80, pp. 59, 60, merely confers a power to return for taxes, not coupled with a duty. No implication can therefore arise from the passage of the resolution that any particular defalcation has been charged against or included in the tax levy of any particular ward. *Ib.*

6. That act applies only to cases where the collector and his sureties are insolvent. *Ib.*
7. Levying and collecting taxes under such resolution does not release or discharge the sureties of a collector. *Ib.*
8. *Semhle*, if the tax-payers are made the ultimate losers, they might insist on being reimbursed by any securities held by the corporation, and such securities might be valid in their hands, and would be valid if they could become the transferees thereof. *Ib.*

See ASSESSMENTS.

#### OFFICERS.

See MUNICIPAL CORPORATIONS, NEW YORK CITY, 1-3.

#### ORDERS.

See APPEAL, 7, 10.

#### PARTIES.

See FRAUD, 1.

#### PARTNERSHIP.

1. When one partner, during the partnership, negotiates respecting and obtains the exclusive use of a right in which the firm was interested, he will be declared to hold such use in trust of the firm. *Weston v. Ketcham*, 54.
2. When a firm under a contract with the owner has the right to the exclusive use of a trade-mark, and during the partnership one of the firm enters into an agreement with the owner, whereby the previous contract is canceled and a new one made, giving to such member the exclusive use

of the trade-mark for a certain number of years, on certain conditions, and at the end of that term, the conditions having been performed, the sole and exclusive right and title to the trade-mark,—*Held*, that such partner took and held the contract, and all the rights and interests given thereby, as trustee for the firm. *Ib.*

3. In the trade-mark case above put the other partners, after knowledge of the contract made by their copartner, expressed their disapprobation, but did not immediately resort to their legal remedy, and notwithstanding the act of their copartner still continued the firm, and in its business used the trade-mark, and manufactured under it as before, and paid to the owners out of the firm's funds the sums stipulated to be paid; yet it appearing that the copartner who procured the contract for his own benefit alone knew the secret of the manufacture,—*Held*, a forced acquiescence, which would not sustain a finding of ratification. *Ib.*
4. If they had moved in the matter, adversely, they would, in asserting their remedy, not have possessed the knowledge by the use of which the capital employed in the manufacture (all of which was contributed by them), might be made remunerative. *Ib.*
5. Fraudulent representations, made by one member of a firm, which induced the purchase of property from the firm, creates a liability wholly disconnected from the liability of the firm, upon the contract made with them. For the fraud the member of the firm committing the same is alone liable to the person injured. *Goldberg v. Dougherty*, 189.
6. The recovery of a judgment against the firm (by the person defrauded) upon the violation of the contract, is no defense to

an action against the individual member of the firm for the fraud. The causes of action are several, and the obligation or liability incurred by the individual member, by his deceit, is an additional and separate security to the purchaser. *Ib.*

#### PAYMENT.

1. A promissory note of a third party, payable at a future time, endorsed and delivered by a debtor in payment of or as security for a part of his indebtedness, operates to take the case out of the statute, as of the day of its delivery to the creditor, not as of its payment. *Smith v. Ryan*, 489.
2. A payment on account, or a transfer of a security as collateral security on account, operates to take a case out of the statute only by reason of a promise implied from the act, to pay the balance. Such a promise can be implied only from the act of the debtor himself or his authorized agent. In the case at bar, the only act done by the defendant was the transfer of the notes; the payment of them at maturity by the makers was not the act of defendant or of his authorized agents. The payment by the makers was not made as agents of the defendant, but in discharge of their principal debt, pursuant to their legal obligations. *Ib.*

See INSURANCE, 1.

#### PERFORMANCE.

See CONTRACTS, 21; SPECIFIC PERFORMANCE.

#### PLEADING.

1. When the defendant's pleading formally and explicitly admits that which establishes the plaintiff's right, he will not be suffered to deny its existence or to prove any state of facts incon-

sistent with that admission. *Schreyer v. Mayor, &c., of New York*, 1.

2. Thus, when the complaint avers that the contract sued on was made by the defendant, and the answer expressly admits such averment, the defendant can not be permitted to prove.—

1. Either that the contract was not his, and that consequently he was not liable thereon.

2. Or (there being no affirmative defense to that effect) that the contract, being fair on its face, was illegal. *Ib.*

3. When the complaint avers the making of a contract fair on its face, and the answer admits such averment, the illegality of the contract can not be insisted on to defeat a recovery unless such illegality is set up in the answer as an affirmative defense. *Ib.*

4. The fact that one of the defendants has answered, has no effect upon the determination of the question as to whether a demurrer is well taken or not. *Webb v. Vanderbilt*, 4.

5. Admission of title in the plaintiff by the answer precludes defendant from insisting that the plaintiff was a mere trustee, and had no leviable interest. *Bruce v. Kelly*, 27.

6. The court has the power to allow any allegation material to the case to be inserted in the answer, although the effect may be to change the defense; and when a new trial has been ordered the court has the same power to allow the parties to amend their pleadings as before the trial. *Schreyer v. Mayor, &c., of New York*, 277.

7. In an action upon a promissory note, an admission in the answer, "that at the time mentioned in the complaint, they (the defendants) made and endorsed a note like that set forth therein," unaccompanied with anything tending to show that it was a dis-

- tinct note from that described in the complaint, and on which the action is brought, must be held to refer to the note sued upon. *Moody v. Andrews*, 302.
8. The defendant in this case, after a general denial, with some exceptions, attempted to set up a counter-claim in the answer. The plaintiff demurred to the counter-claim, on the ground "that the same does not state facts sufficient to constitute a defense to the plaintiff's complaint." The court below overruled the demurrer, without prejudice to the right of plaintiff to move that the defenses in the answer be made more definite and certain. *Held*, on appeal, that this demurrer in its present form notifies the defendant that the objections to the pleading are not of a general nature, but confined to the special matter stated therein, namely, the counter-claim; therefore, the order below must be examined upon the nature of this special ground of demurrer. *Armour v. Leslie*, 353.
9. The code distinguishes between a defense and a counter-claim. It is not necessary that a counter-claim should contain facts sufficient to make a defense, and, therefore, it was impossible for the court below to properly make any other order than that appealed from. It would be clearly wrong in this case, for the court to decide that the allegations did not constitute a counter-claim, because they were not sufficient as a defense. *Id.*
10. Where a defendant relies on certain facts which can constitute a defense only as connected with the basis of the cause of action, he must in his answer distinctly aver and show such connection. *Donovan v. Compagnie Generale Trans-Atlantique*, 519.
11. Plaintiff brought an action against a common carrier for the non-delivery and loss to her of a certain case of merchandise, delivered to it at a certain time. An answer averring that plaintiff did deliver baggage and merchandise at the time, with the intention of being smuggled, and that on her arrival at the port of New York, she did smuggle ashore from the steamer large quantities, which formed part of her baggage, does not comply with the above rule. It is bad, as not distinctly averring that the specific case for the loss of which the action was brought, and which formed the basis of the cause of action, was shipped with such intention. *Id.*
- See BILL OF PARTICULARS.

#### PLEDGE.

1. Where the pledgee of goods left the goods in a warehouse selected by the pledgor (which was a suitable place) under the charge of warehousemen who had previously been co-partners with the pledgor, and who had sustained good reputations up to the time of their subsequent absconding, and employed an agent who periodically visited the warehouse, and examined the goods to see that they were properly stored and protected, and kept in proper condition, his last visit being about a week before the absconding,—*Held*, that the pledgee was not guilty of gross negligence, and therefore not liable for the value of the goods stolen or misappropriated by the absconding warehousemen. *Van Nostrand v. New York Guaranty & Indemnity Co.*, 73.
2. Where a party holds a note as a pledge, the law confers upon him the power to receive the whole money from the makers of the note, and sue and collect the same. The money when received by him, is held as a substitute for the note, and subject

to all the terms and conditions affecting it (*Garlick v. James*, 12 John. 146). When commercial paper is received as security, for an advance of money made upon it at the time, without notice of any defects of title, the law merchant protects the transferee against all latent equities, whether of the parties to the paper or third persons (*Weaver v. Barden*, 49 N. Y. 294; *Muller v. Pondir*, 55 N. Y. 332). The pledgee of commercial paper, in the absence of any special power, is bound to hold it, and to collect it, and apply the money to pay the loan, and to account for and to return the balance, if any remain (*Wheeler v. Newbould*, 16 N. Y. 392). The allegation in this answer to the effect that there are other parties claiming title to the note, or to the proceeds, are of no force. The proceeds of the note are to be reached through the plaintiff. *Moody v. Andrews*, 302.

3. This answer does not put in issue plaintiff's allegation in the complaint, that he is the lawful holder of the note, but states facts that do show that the plaintiff is the lawful holder of the note, for value. *Id.*

#### PRINCIPAL AND AGENT.

In this state, many cases have been decided where it has been held, that when a contract not under seal has been made in writing by a person apparently acting on his own behalf, his unnamed and undisclosed principal may sue and be sued upon the same, although the contract was required to be in writing by the statute of frauds but the principle and rule of these cases fail, in the case of a contract under seal for the conveyance of real estate. An unnamed and undisclosed principal can not be made liable for a breach of such

a contract, nor compelled to perform the same specifically, nor can he enforce the same. See the able opinion of the court in this case, for the review of numerous decisions upon this question. *Briggs v. Partridge*, 339.

#### PRINCIPAL AND SURETY.

Where, after the execution of a bond with sureties for the faithful performance by the principal of certain duties and trusts, and the accounting and paying over of all moneys of the obligee coming to his hands, the principal received, in the course of his employment, moneys of the obligee which he failed to account for and pay over, which was well known to the obligee,—*Held*, that the obligee's thereafter keeping the employee in his service, without notifying the sureties of such default, did not discharge them from liability for future default, it not appearing either that the omission to give notice resulted in any injury to the sureties, or that the default was fraudulent in its character. *Atlantic & Pacific Tel. Co. v. Barnes*, 40.

#### PROMISSORY NOTES.

1. A transfer of a promissory note by delivery without the payee's indorsement, if made on a valuable consideration, amounts to an assignment, and passes the title to the note to the person to whom it is delivered. *Rygnor v. Hoagland*, 11.
2. Such a transfer will pass the title free from the equities between the maker and payee, when the note thus transferred pursuant to agreement between the maker, payee, and transferee to that effect, is delivered to the transferee in renewal of a former note made by the same maker, payable to the same payee, and indorsed by the payee, held by such transferee,

and on which the liability of the maker and indorser had become fixed, and to which neither of them had any defense as against the holder. *Ib.*

3. Where a promissory note is made at the request and for the accommodation of the plaintiff, without any consideration whatever between the plaintiff and the maker, such facts constitute a good defense in favor of the maker. *Murphy v. Keyes*, 18.
4. Where there was evidence to the effect that plaintiffs having a claim against A. (the father), requested him to give them therefor the notes of one of his sons, as they could not use his paper, and that thereupon at an interview between one of the plaintiffs, the father and his son, at which the son made the note sued on, the father, in the presence of the plaintiff, said to his son that the making of the note was a mere form, and that he, the father, would see to it, and the son would have nothing to do with it, and thereupon the son gave the note payable to the order of the father, knowing it was for a debt due by the father to the plaintiffs, which note was indorsed by the father to the plaintiffs, and also evidence to the effect that before this interview the father had told the son that the plaintiffs wanted his note, and the son objected on ground that he owed plaintiffs nothing whatever on it, and the father said that the plaintiffs wanted his (the son's) note, so that they could raise money on it, inasmuch as they could not raise money on the father's note, and that it was a mere form; and also conflicting evidence as to whether plaintiffs gave a receipt for the debt for which the note was received, or took the note in payment for the debt.—*Held*, that the evidence was sufficient to carry the case to the jury on

the question as to whether the note was made at the request of and for the accommodation of the plaintiffs, without any consideration whatever between the plaintiffs and the son. *Ib.*

5. In an action upon a promissory note, an admission in the answer, "that at the time mentioned in the complaint, they (the defendants) made and endorsed a note like that set forth therein," unaccompanied with anything tending to show that it was a distinct note from that described in the complaint, and on which the action is brought, must be held to refer to the note sued upon. *Moody v. Andrews*, 302.
  6. The holder of a negotiable promissory note is entitled to protection against latent equities existing between the parties to the paper, when he became the holder, only when he has parted with something of value in money or property for the note, at the time he received the same, or he must have incurred some responsibility or liability, or parted with some right on the faith of the note. *McQuade v. Irwin*, 396.
  7. The case at bar, where the plaintiff received the note for an existing antecedent debt, does not fall within this well and long established rule. *Ib.*
- See PAYMENT, 1; PLEDGE, 2.

#### RAILROADS.

1. If a street railway car is at rest or on the point of rest although some motion remains, the getting on by the front instead of the rear platform is not, as matter of law, contributory negligence. *Maher v. Central Park, North & East River R. R. Co.*, 155.
2. If the evidence leaves it uncertain as to whether the motion was not so great as to make it unsafe for a man of common

prudence to get on the car, the question should be submitted to the jury. *Ib.*

3. The hurrying-up of the horses while a passenger is in the act of getting on, and before he is fairly on, is evidence of negligence to go to the jury. *Ib.*

4. Where there was evidence that at the time a passenger was getting on a car by the front platform, the car was at rest or on the point of rest, and that the driver invited the passenger to get on by the front platform, and the court charged the jury that they should find for the defendant, unless the proof showed that the car was stopped or being stopped, and further charged that the front platform is a place of danger, and the occupation of it or an attempt to get on by it is prima facie evidence of danger, unless the passenger is invited so to do by a servant of the company,—*Held*, that the qualification as to the invitation must be considered as applied to the case of a passenger attempting to get on while the car was at rest or on the point of rest. In this aspect the charge was a more favorable one to the carrier than he had a right to ask for. *Ib.*

#### REFERENCE.

1. The findings of a referee upon conflicting evidence should not be disturbed, and especially so, when the contradictions are irreconcilable, and one side or the other must be disregarded. *American Corrugated Iron Co. v. Eisner*, 200.
2. His findings of fact, like the verdict of a jury, will not be disturbed by an appellate court, unless unsupported by, or very clearly against, the weight of evidence. *Ib.*
3. Upon a motion for a compulsory reference, the fact that the answer presents a question

of fraud for trial is not a sufficient answer. *Patterson v. Stat-tauer*, 418.

4. An affidavit made by the attorney and counsel of the party opposing the motion, stating generally that difficult questions of law are involved is not sufficient. The questions of law expected to arise must be pointed out specifically, and in such manner as to enable the court to determine whether they are of any real difficulty. *Ib.*

5. A motion for a compulsory reference of all the issues may be founded on averments contained in the answer. *Maryott v. Thayer*, 417.

6. Thus in an action on contract, where the answer sets up as affirmative defense or defenses, by way of counter-claim or otherwise, involving the examination of a long account, all the issues are referable, although the cause of action set forth in the complaint is non-referable. *Ib.*

See APPEAL, 12-15; CONTRACTS, 13, 14.

#### SALES.

The defendant, desiring to purchase a wagon fitted with a pole, went to the plaintiff's establishment, and there saw a wagon fitted with shafts which would suit him if a pole was fitted to it. The price of the wagon as it stood was four hundred and seventy-five dollars. The defendant asked how much a pole would cost. Plaintiff answered forty dollars. Defendant said he would not give so much for a pole, that he had several poles, one of which he thought could be made to fit the wagon, and he wanted plaintiff to fit it to the wagon. Plaintiff said if it was possible to do so without going to very great expense, in fact, making almost a new pole, he would, without any extra expense, as far as the pole was con-

cerned. Plaintiff sent for the pole and found that it could not be fitted to the wagon, and thereupon sent the wagon as it stood to McDonnell's stable, where the defendant had directed it to be sent. Defendant was not consulted in relation to plaintiff's decision that the pole could not be fitted, nor did it appear from the evidence that he had notice of it, or consented to accept the wagon without the change. *Held*, no acceptance of the wagon as it stood, without having a pole fitted to it. *Brewster v. Taylor*, 159.

#### SHERIFFS.

1. In respect to executions against property, the sheriff is bound to use all reasonable endeavors to execute the process of the law in the most effectual manner. *Watson v. Brennan*, 81.
2. The fact that property is in the custody of the law does not absolve the sheriff from this duty. He is nevertheless bound to use such reasonable care and diligence as will, if the goods or any part thereof are under the fact and the law subject to the execution held by him at the time of its issue, or if they or their proceeds, or any part thereof, subsequently during the life of the execution become subject thereto, enable him or the plaintiff in the execution so to subject the same. *Id.*
3. If, by his omitting to use such care and diligence, the plaintiff thereby loses the benefit of his execution, the sheriff will be liable in an action for a false return. *Id.*
4. In an action against the sheriff for a false return, it does not lie with the sheriff to urge that the plaintiff's judgment is invalid under the bankrupt act, and that therefore no act done under or by color of it could enure to plaintiff's benefit. *Id.*
5. Thus where the defendant, being an incumbent sheriff, held three executions against the same judgment debtor (the plaintiff's being the junior of the three), and the preceding sheriff, under a previous attachment against the same judgment debtor, had attached and held in custody goods of sufficient value to satisfy the attachment and all the executions, and refused to allow his successor to seize and levy on them under his executions, but allowed a portion to be removed from his custody in a concealed and surreptitious manner, by persons other than his successor, of which the deputy holding the executions had notice, and afterwards bankruptcy proceedings were commenced against the judgment-debtor in which the attachment was declared void under the bankrupt act, and an order made on notice to the incumbent sheriff, authorizing him to sell the property which had not been removed, and directing him to hold the proceeds, under which order he did sell and afterwards applied the proceeds on the two executions prior to the plaintiff's leaving a balance unpaid on one of them, the money so applied, however, as well as the proceeds of the goods removed (which were sold under an order in the bankruptcy proceedings) were subsequently, under an order in those proceedings, paid over to the assignee in bankruptcy, and the plaintiff's execution was thereafter returned *nulla bona*—*Held*,
  1. That the deputy holding the plaintiff's execution owed to him the duty of seeking from the watchman who gave the information of the removal what information and knowledge he had about it, of making inquiries for persons or carts likely to remove the goods, of

asking to look at the warrant of attachment, of applying to the former sheriff himself in relation to the removal of calling on him to release from the levy of the attachment all goods beyond what was necessary to satisfy the attachment and sheriff's fees, of notifying the plaintiff of the excessive levy under the attachment, and of the removal, and of either making a claim under the plaintiff's execution in the bankruptcy proceedings, or notifying the plaintiff so that he could either indemnify the sheriff or make a claim himself.

2. That the deputy not having performed these duties, the plaintiff had lost the benefit of his execution by reason of such negligent omission.

3. That the negligence was of such character as to entitle the plaintiff to recover, in an action for a false return, the amount of his execution and interest thereon.

4. That the proceedings in bankruptcy did not relieve the sheriff from the liability raised by such negligence.

5. It does not lie with the sheriff to raise the objection that plaintiff's judgment was invalid under the bankrupt law, and urge that, therefore, neither the property nor its proceeds could be realized under it. *Id.*

See ARREST, 2; EXECUTION.

#### SMUGGLING.

See CARRIERS, 1-3.

#### SPECIAL TERM.

See JUDGMENT, 3, 4.

#### SPECIFIC PERFORMANCE.

1. The superior court, as a court of equity, has the same jurisdiction as the late court of chancery of this state, in actions to compel the specific performance of

contracts for the purchase and sale of real estate, where the parties to the action have been brought within its jurisdiction by service of process or otherwise. *Baldwin v. Talmadge*, 400.

2. The late court of chancery exercised such a jurisdiction (see the cases cited in the points of counsel and the opinion of the court). *Id.*

3. The provisions of the code are not applicable, when land which is the subject of the action lies out of the state. *Id.*

#### STATUTES.

See ASSESSMENTS.

#### SUBROGATION.

See LIEN.

#### SURETIES.

See PRINCIPAL AND SURETY.

#### TAXES.

See NEW YORK CITY, 5-8.

#### TRADE-MARKS.

Although defendant does not know the secret of the manufacture, and is selling under the trade-mark an article different from that represented by it, yet (whatever may be the effect of these elements in other cases) no cause of action arises therefrom against him in favor of one who has no more right to the trade-mark than he has. *Weston v. Ketcham*, 54.

See LITERARY PROPERTY; PARTNERSHIP, 2-4.

#### TRIAL.

1. Upon a motion to dismiss a complaint on a particular ground, if that ground is untenable, and there is no other ground which is incapable of being obviated, a denial of the



- motion is proper. *Raynor v. Hoagland*, 11.
2. Upon the denial of such a motion, if no other motion or request is made, and no evidence given on the part of the defense, the court can not do otherwise than direct a verdict for the plaintiff. *Id.*
  3. Although a witness swears that he acted honestly and in good faith, yet the trial judge, in passing on his credibility, has a right to disregard his unsupported or improbable professions, and construe his acts in the light which the facts and circumstances of the case throw upon his possible and probable motives, designs, and interests. *Bruce v. Kelly*, 27.
  4. Where the testimony is clearly within reach, an assumption that the omission to produce it was the result of knowledge or fear on the part of that party to the action with whom it laid to produce the testimony, that the case could not be improved by the production thereof, is justified. *Id.*
  5. The admission in evidence of declarations by alleged confederates, before proof of the combination, is not error if the combination is subsequently proved. *Id.*
  6. In the construction of instructions to the jury, the whole charge must be considered and applied to the facts of the case. *Maher v. Central Park, North & East River R. R. Co.*, 155.
  7. In an action brought to recover the value of certain services performed by the plaintiff for the defendant, in Mexico, claimed to be worth fifty thousand dollars, but for which plaintiff recovered in this action ten thousand dollars, from which judgment both parties appealed,—*Held*, on appeal, that there was a valid agreement between the parties that would support the claim of the plaintiff on a quantum meruit, and that the real question in the case was as to the amount that plaintiff should recover; but on the review of some of the exceptions to evidence received under objection by the court below, a new trial was ordered. These exceptions are embraced in the following points:
    1. The plaintiff, as a witness, had stated that at Orizaba, on the way from Vera Cruz to Mexico, he fell sick, and in consequence thereof he stayed at Orizaba six weeks. He was then asked, "What expenses were you put to by your illness there?" and he answered after objection, &c., that his expenses were six or seven hundred dollars, gold. The general term held this testimony to be inadmissible, and that the error of the court was not cured by the subsequent direction of the judge at the close of the trial, in his charge to the jury, to disregard it, and his order to strike it out from the testimony in the case. This evidence had already (at the time it was stricken out) had its effect upon the jury, and it can not be said that their judgment was not influenced thereby.
    2. There was also error in allowing the jury to take into consideration the subject and expense of entertainments given by the plaintiff in Mexico to the emperor and empress, and to the emperor's cabinet ministers, when there was no proof before them of their value or of what they consisted. *O'Sullivan v. Roberts*, 360.
  8. In this action, the form of the complaint was for the unlawful conversion of bonds of plaintiff by the defendant. The proofs established that a right of action existed in favor of plaintiff, by reason of a promise of the defendant, and of the connection of the latter with the company who issued the same. Plaintiff

at the close of the trial moved to amend his complaint so as to conform it to his proofs. The court referred the plaintiff's application to the general term, and after directing a verdict for the plaintiff, ordered all the exceptions to be heard in the first instance at general term. It appeared that all the testimony that established a cause of action in favor of plaintiff had been taken under the specific objections and exceptions of the defendant to all evidence of this class, except only so far as it would tend to show notice to defendant of the plaintiff's claim; and the court expressly ruled that it should be limited to that effect solely, and that it was the clear and expressed understanding between the court and the counsel at the trial, and the trial was conducted and concluded upon that theory. *Held*, that under such circumstances the plaintiff should not be allowed to amend his complaint so as to conform the same to the proofs, for in such case the defendant would have judgment passed against him without a hearing upon the merits. He had a right, under his objections and exceptions, and the express rulings of the court, to consider that all this testimony was received as applicable only to the cause of action stated in the complaint, it being limited by the court to the effect the same would have to show notice to the defendant of the plaintiff's claim. This testimony was not received for the purpose of establishing a cause of action founded upon defendant's promise or contract. *Smith v. Frost*, 389.

9. *Held*, that the real issue between the parties had not been tried, and a new trial was ordered, with costs to the defendant to abide the event. *Ib.*

10. What questions are not objec-

tionable, as calling for a conclusion of law, or for evidence beyond the knowledge of witness. *First National Bank of Portland v. Schuyler*, 440.

11. Where a witness gives to a question, the allowance of which is not error, an answer which is responsive, but which merely states his opinion on the subject matter inquired of, and no objection is taken to his answer, there is no error calling for a reversal. *Pollock v. Brennan*, 477.

12. Sustaining an objection urged in the middle of a question is not error where the reason for the exclusion does not appear, and the counsel does not claim the right to complete. A substantial reason, growing out of the usual incidents of a trial, must be presumed to exist. *Ib.*

13. Testimony is not to be regarded as undisputed, although not specifically controverted, when there is enough in the case to allow of its construction in connection with the other facts, and to justify the results that although the witness was in general credible, yet he was incorrect as to the particular testimony in question; as where a witness swears that the work set forth in a certain bill was extra, when it is quite plain from the face of the list that it contains many items which could not have been extra work. *Johnson v. Williams*, 547.

See EXECUTION, 4-7; JUDGMENT, 1, 2.

#### TRUSTS.

1. Where the trustee has no funds in his hands, and services are necessary to be performed, either for obtaining possession or for the preservation of the trust property, he may enter into a contract to have the same performed, not on his personal responsibility, but solely on the

faith and credit of the trust property, so that payment thereof shall be contingent on success, and to be made out of the trust property. *Randall v. Dusenbury*, 174.

2. This is an exception to the general rule that a trustee can not make a contract with a third party which shall bind the estate or fund, and is personally liable for his contracts with regard to the estate or fund. *Id.*
3. Persons acting under the claim or pretense of being trustees, who have, in proceedings instituted by them, secured the fruits of the services of one employed by them, are estopped from shielding themselves against liability for payment for such services out of such fruits, on the ground that their acts were unlawful and void. *Id.*
4. As to effect of implied trust upon legal title, see remarks of MONELL, Ch. J., in *Hudson v. Smith*, 452.

#### WAREHOUSEMEN.

See PLEDGE, 1.

#### WITNESSES.

1. Although a witness swears that he acted honestly and in good faith, yet the trial judge, in passing on his credibility, has a right to disregard his unsupported or improbable professions, and construe his acts in the light which the facts and circumstances of the case throw upon his possible and probable motives, designs, and interests. *Bruce v. Kelly*, 27.
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